88-1013

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

RAYMOND DE LEO and ANNA A. DE LEO,
Appellants,

v.

ANTHONY A. NUNES, INC., and SALLY APPLETON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

JURISDICTIONAL STATEMENT

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December 19, 1988

QUESTIONS PRESENTED

The appealable[1] question presented is:

1. Whether a state's highest court can, consistent with the Due Process clause of the Fourteenth Amendment to the United States Constitution, apply an appellate procedural rule in a novel and arbitrary manner to affirm a state tort judgment sounding in slander for compensatory and punitive damages against an active participant in a robust environmental debate on the basis of

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1/ Appellants are here presenting an appealable issue -- the unconstitutionality of a state appellate procedural rule having the force and effect of statute as applied to them -- together with other denials of federal right whether or not capable in themselves of being brought here on appeal. Since the appealable issue is presented together and is factually intertwined with the non-appealable issues, and since the effect of both the appealable and non-appealable denials of federal right in this case is one and the same -- to chill robust debate on matters of utmost environmental concern -- DeLeo respectfully asks this Court to consider the non-appealable issues together with the merits of the appealable issue. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487 n.14 (1975). DeLeo further requests that, should this Court find jurisdiction lacking for any reason under 28 U.S.C. §1257(2), the Court consider this appeal as a petition for certiorari pursuant to 28 U.S.C. §2103.

statements of law he uttered without determining whether those statements of law were true?

The additional questions presented include:

2. Whether a state's highest court can, consistent with the Due Process clause of the Fourteenth Amendment, apply an appellate procedural rule and estoppel theory in a novel and arbitrary manner to affirm a state court tort judgment sounding in slander for compensatory and punitive damages against an active participant in a robust environmental debate on the basis of statements of law he uttered without determining whether the statements uttered were true, reasonable or without actual malice?

3. Whether an active participant in a robust environmental debate can, consistent with the First Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, be held

liable for compensatory and punitive damages sounding in slander under state tort law for having made true, reasonable or not knowingly false statements of law?

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JURISDICTIONAL STATEMENT

INTRODUCTION

Appellants, Raymond DeLeo and Anna A. DeLeo ("DeLeo"), are before this Court appealing the judgment of the Supreme Court of Rhode Island and Providence Plantations ("Rhode Island Supreme Court") entered August 24, 1988, rehearing denied September 21, 1988. This Jurisdictional Statement is submitted to show that the state procedural grounds adopted by the Rhode Island Supreme Court to refuse to hear DeLeo's First Amendment defenses to a judgment entered for allegedly slanderous speech are not only inadequate to preclude review of the First Amendment defenses in this Court but also violate DeLeo's due process rights under the Fourteenth Amendment. The Jurisdictional Statement will further demonstrate that the statements made by DeLeo are squarely protected under the First Amendment and that the issues presented to this Court are

substantial.

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court appealed from, App. A at 1a, is reported at 546 A.2d 1344 (August 24, 1988). The Rhode Island Supreme Court's order of September 21, 1988 denying DeLeo's Petition for Reargument, App. B at 21a; the 1982 interlocutory order of the Superior Court of Rhode Island vacating DeLeo's lis pendens filing, App. E at 70a; and the 1982 interlocutory order of the Superior Court of Rhode Island dismissing DeLeo's complaint, App. F at 80a; are all unreported.

JURISDICTION

This appeal, notice of which was filed in the Rhode Island Supreme Court and Superior Court on September 23, 1988 and brought here pursuant to 28 U.S.C.

§1257(2),[2] draws into question Rhode Island Supreme Court Rule 3(c)[3] -- which under Rhode Island law has the force and effect of statute (G.L.R.I. §8-6-2) -- as applied to DeLeo and upheld against a federal constitutional challenge raised at the earliest possible opportunity. The grounds for the appeal are that Rule 3(c), as construed and applied, impermissibly curtailed DeLeo's First Amendment right to establish the truth of his statements of law on a

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2/ DeLeo acknowledges Senate Bill 952 which revokes the appellate jurisdiction of this Court under Section 1257(2) effective ninety days after the President signed the bill into law on June 27, 1988, or September 25, 1988. See Cong. Rec. Index, 100th Cong. (CCH), p.20,053 (July 29, 1988). Such revocation, however, does not "affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." Pub. L. No. 100-352, §7, 102 Stat. 662, 664 (1988). Since the Supreme Court of Rhode Island entered final judgment on August 24, 1988 and denied DeLeo's Petition for Reargument on September 21, 1988, this appeal falls within the grandfather provision of Senate Bill 952.

3/ Rule 3(c) provides, in relevent part, that the notice of appeal "shall designate the judgment, order or decree or part thereof appealed from." App. N at 120a.

matter of pressing public concern as a defense to appellees' counterclaim judgments sounding in slander for compensatory and punitive damages, and is therefore invalid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The judgment appealed from is dated August 24, 1988. DeLeo's petition for reargument was denied on September 21, 1988.[4] The jurisdiction of the Court to hear this appeal is more fully briefed below. See Section II below.

4/ This Court has certiorari jurisdiction over all the issues presented pursuant to 28 U.S.C. §1257(3). The Rhode Island Supreme Court's invocation of novel and arbitrary procedural doctrines to preclude it from determining the truth, reasonableness or, lack of knowing falsity of DeLeo's legal claims as a slander defense violates DeLeo's Due Process rights under the Fourteenth Amendment, and its affirmance of the slander judgment against DeLeo despite the truth, reasonableness or lack of knowing falsity of his statements violates DeLeo's First Amendment rights.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution; the First Amendment to the United States Constitution; Supreme Court of Rhode Island Rules 3(c), 4 and 16(h); and Rhode Island Civil Practice Rule 54(b). These constitutional, statutory and regulatory provisions are reproduced at App. N at 118a.

STATEMENT OF THE CASE

DeLeo lives in Bristol, Rhode Island, across the street from the properties of appellees, Anthony A. Nunes, Inc. ("Nunes") and Sally Appleton ("Appleton"), which front the shore at a point called Walker's Cove. DeLeo also owns property which abuts appellees' waterfront lots (Pl. Exh. 28). Portions of appellees' waterfront property consist of tidelands which were filled in 1933 pursuant to permits issued to the Herreshoff Manufacturing Company, a shipbuilder, by the U.S. War Department.

These permits expressly provided that they did not grant any property right in real estate or any exclusive privilege to the Herreshoff Manufacturing Company. (Def. Exh. DD). The parcels at Walker's Cove passed eventually to appellee Nunes, a real estate developer, whose quitclaim deed (Pl. Exh. 2.) was the first to reference the filled lands as part of the conveyed premises. In 1980, Nunes' proposed to build a private condominium style development on the property. Subsequently, Nunes conveyed one lot with improvements to appellee Appleton, again by quitclaim deed. That deed referenced restrictions as to claims "asserted by the United States of America and/or state of Rhode Island and Providence Plantations in and to any portions of said lot created by filling between the natural high water line and the harbor line." (Pl. Exh. 10).

In 1980, Nunes' plans to develop these

filled tidelands by erecting private homes began to emerge. Nunes published brochures illustrating those plans and soliciting offers. Tr. III, 85. DeLeo, along with several of his neighbors, Tr. III, 171-82, vigorously opposed this development on the legal ground that the public's interest in and access to these filled tidelands which would be foreclosed by Nunes' development, were protected under the public trust doctrine against elimination by purely private residential development. DeLeo appeared on numerous occasions before local and state zoning and planning agencies to present this legal argument, and wrote letters to the same effect to several public officials. Pl. Exh. 45-50; Tr. II, 229.[5]

5/ In addition to the public's interest in all this land, DeLeo claimed a personal, but not exclusive, Tr. V, 153, interest in a small triangular outcropping on the portion of the land Nunes sold to Appleton, arguing that as the owner of the upland

(Footnote Continued on Next Page)

On September 3, 1981, DeLeo filed a complaint against Nunes in Rhode Island Superior Court for a declaratory judgment as to the claimed interests and for injunctive relief. Later he amended the complaint to include Appleton. (Pl. Exh. 24). Contemporaneously, DeLeo filed notices of lis pendens against the Nunes and Appleton property. (Pl. Exhs. 25 and 27). On October 22, 1982, a justice of the Rhode Island Superior Court ruled that the lis pendens were null and void because, under his view of Rhode Island law, all public trust rights in the Nunes and Appleton tideland properties had been extinguished

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5/ (Footnote Continued From Previous Page)

perpendicularly fronting the triangular outcropping, he had rights to the use of this filled land under Rhode Island law. In making this legal claim, DeLeo consulted and relied on the opinions of several professional title examiners. Tr. V, 107, 112; Def. Exh. EE. In developing Appleton's land, appellee Nunes removed this triangular outcropping from the coastline to use as landfill on another part of the property in late 1982 and early 1983.

when the lands were filled in 1933, notwithstanding the express disclaimers on the permits to fill. App. E at 70a.[6] Based on this ruling, an order entered in December 1982 dismissing the complaint. App. F at 80a. DeLeo attempted to appeal this dismissal, but that appeal was dismissed as premature in January 1983, since the rights and liabilities of all the litigants had not yet been adjudicated. App. G at 82a.

Meanwhile, Nunes and Appleton had counterclaimed against DeLeo alleging slander of title, abuse of process and malicious use of process. During the trial in the fall of 1985, DeLeo asserted the truth, reasonableness and lack of actual malice of his public trust claims given his reliance upon the applicable public trust law and advice of counsel. Tr. V, 106-11, 114-17, 124-26,

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6/ The trial judge did not rule on DeLeo's legal claim to rights in the triangular piece.

133. The trial judge specifically addressed the merits of these First Amendment defenses on several occasions. Tr. IV, 224-26; Tr. V, 7; Tr.(New Trial Motion 5/1/86) 4-6. After directing verdicts in favor of DeLeo on the abuse of process and malicious use of process counts, the trial justice sent the case to the jury on the slander of title counterclaim. The jury returned a general verdict against DeLeo for compensatory damages of $104,114 and punitive damages of $75,000 in favor of appellee Nunes. Compensatory damages of $3,000 and punitive damages of $7,000 were awarded to appellee Appleton. On motion, the trial court ordered a remittitur of Nunes' compensatory damage award to $89,421 and his punitive damage award to $30,000. The awards to Appleton were undisturbed.

DeLeo appealed the judgment to the Rhode Island Supreme Court by filing a timely notice of appeal which specifically

indicated that he was appealing the final judgment entered in the case. App. H at 84a. He did so by checking a box on a standardized notice of appeal form labeled "Judgment/Jury." He did not check an adjacent box labeled "Dismissal Merits" because he had determined not to pursue his complaint. Subsequently, in accordance with Rhode Island procedure, see Rhode Island Supreme Court Rule 16(h), and well in advance of any briefing, he filed and served a pre-briefing statement with the Rhode Island Supreme Court and appellees specifically designating the issues he intended to raise on appeal. These issues included the propriety of the trial justice's 1982 determination that the public's interest in appellees' filled tidelands had been extinguished by filling and whether DeLeo's arguments were privileged under the First Amendment. App. J at 92a.

In his brief to the Rhode Island

Supreme Court, DeLeo argued extensively the truth of his legal claim that the public retained an interest in appellees' filled tidelands under the public trust doctrine. He further argued that his reasonable and not knowingly or recklessly false belief in the public's surviving interest in appellees' tideland property based on the public trust doctrine, constituted a complete First Amendment defense to appellees' counterclaims alleging slander. In their responsive brief, appellees argued (without citing any precedent on point) that DeLeo was precluded from raising the public trust doctrine as a defense to appellees' counterclaims under Rhode Island Supreme Court Rule 3(c) because he failed to mark the box labeled "Dismissal Merits" on the standardized notice of appeal form. In reply, DeLeo cited Supreme Court Rule 4, which clearly states that "an appeal from a judgment preserves for review <u>any</u> claim of

error in the record." (Emphasis supplied.) DeLeo further cited Pearson v. Old Stone Savings Bank, 119 R.I. 836, 383 A.2d 1029 (1978), holding that under Rhode Island law a final judgment incorporates and subsumes all interlocutory orders which may have preceded it; and Rhode Island Civil Practice Rule 54(b), which provides that accelerated entry of final judgment on an interlocutory order can be made only by an express determination of the court. No such accelerated final judgment was requested or made concerning either the order to vacate the lis pendens or the dismissal of DeLeo's complaint.

In its decision dated August 24, 1988, the Rhode Island Supreme Court embraced appellees' Rule 3(c) argument almost verbatim, holding that DeLeo's failure to specifically appeal the dismissal of his complaint precluded any consideration of the merits of his public trust claim (i.e., its

truth) as a defense to the slander of title counterclaims and judgment. In so holding, the Rhode Island Supreme Court applied Rule 3(c) in an unprecedented and arbitrary fashion. DeLeo had specifically appealed from the final judgment entered against him on appellees' slander of title counterclaims and thus was entitled under the plain language of Rule 3(c) and Rule 4 as well to raise and have resolved on appeal any and all defenses to the judgment.

The Rhode Island Supreme Court further held that the trial court's determination at the lis pendens hearing in the very same case, to the effect that the public retained no interest in appellees' filled tidelands sufficient to support the filing of a lis pendens, collaterally estopped DeLeo on appeal from raising the public trust doctrine as a defense in any manner whatsoever (i.e., from raising the reasonableness and lack of actual malice of his public trust

claims as a First Amendment defense to the slander judgment incurred). On this basis, the Rhode Island Supreme Court categorically declined to address any of DeLeo's arguments and cursorily affirmed the compensatory and punitive damage awards on a record which it construed as evidencing a malicious motive. App. A at 10a; 546 A.2d at 1346. The court also reversed the direction of verdicts entered by the trial court in DeLeo's favor on appellees' abuse of process and malicious use of process counterclaims, citing the same alleged evidence of malicious motive and again ignoring DeLeo's brief and his First Amendment defenses. App. A at 14a; 546 A.2d at 1347. It remanded the case to the trial court for further proceedings on the abuse of process and malicious use of process counterclaims and ordered a new trial on the slander of title damage award if appellees did not comply with the trial court's remittitur.

On August 29, 1988, DeLeo filed a petition for reargument, alleging the unconstitutionality of Rule 3(c) as applied, the unconstitutional application of collateral estoppel, and the truncated appellate review afforded him. App. B at 21a. On September 21, 1988, the petition for reargument was summarily denied. App. C at 65a. On September 23, 1988, the day DeLeo filed his notice of appeal to this Court in the Rhode Island Supreme Court and Superior Court, appellees noticed their consent to the trial judge's remittitur. App. M at 115a. A writ of execution on the judgment issued on September 26, 1988. App. I at 88a. Appellees have consented to stay execution pending the outcome of proceedings in this Court in consideration for security sufficient to guarantee payment of the judgment. App. P at 138a.

ARGUMENT

I. THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A substantial federal question is presented whenever meritorious First Amendment defenses are rejected on the basis of suspect procedural technicalities. Monger v. Florida, 405 U.S. 958, 960 (Douglas, J., with Brennan, J., and Stewart, J., dissenting from denial of certiorori by reason of adequate and independent state law grounds). See also American Manufacturers Mutual Ins. Co. v. American Broadcasting - Paramount Theatres, Inc., 17 L.Ed.2d 37, 39, 87 S.Ct. 1 (1966) (Harlan, J., in chambers). Moreover, given the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), DeLeo's First Amendment defenses of truth, reasonableness and lack of actual malice are serious and substantial,

especially in the context of vindicating threatened public rights to scarce natural resources, and should be considered by this Court. Scotland v. Pennsylvania, 398 U.S. 916, 921 (1970) (Douglas, J., dissenting from dismissal of appeal). Particularly where, as here, it is plain that the direct result of the procedural trap employed below is to deny constitutional rights, this Court should not decline jurisdiction. Rogers v. Alabama 192 U.S. 226, 230 (1904); See also Ancient Egyptian Arabic Order of Nobles v. Michaux, 279 U.S. 737, 745 (1929) (federal right, though not denied in terms, is denied in substance and effect where state ground of decision having no fair support is imposed). The deleterious effect of these procedural and substantive deprivations is not limited to DeLeo. The public interest as a whole has been severely compromised. See Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 294 (1921) (Brandeis, J., dissenting).

First, the Rhode Island Supreme Court's arbitrary refusal to protect DeLeo's First Amendment right to assert the applicability of the public trust doctrine sends a chilling message to all parties who may wish to challenge the rampant shorefront real estate development presently underway in Rhode Island (as well as in other states) by presenting their legal claims before duly constituted governmental bodies, and, therefore, is of enormous significance for the future of citizen participation in government and public affairs generally. See App. O at 129a. Such citizen participants are now on notice that their anti-development petitioning activities may fail to receive the First Amendment protection they clearly deserve (see Evers v. County of Custer, 745 F.2d 1196, 1200-01 (9th Cir. 1984); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611 (8th Cir. 1980)); and that they run the risk of incurring punitive damages for efforts

which should be encouraged and protected. Punishing litigants who raise unpopular views has been flagged on numerous occasions by this Court as a substantial problem in the First Amendment area. See International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 50-51, n.14 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 160 (1966).

Moreover, as this Court has recently acknowledged in the context of labor disputes (see Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 740-41 (1983)) intimidation, retaliation or harassment lawsuits and counterclaims alleging such tortious conduct as defamation, malicious prosecution, abuse of process, and interference with contractual or business relations or with prospective advantage, pose a serious threat to organizations and individuals who involve themselves in issues of public

importance.[7] The Rhode Island Supreme Court's decision, if allowed to stand, would condone the practice and exacerbate the problem. DeLeo, by vigorously advancing his view that the public retains an interest in appellees' lands under the public trust doctrine has done nothing more than engage in robust political speech on a matter of utmost public concern. As a recompense for this important and salutary activity, DeLeo has been held preclusively liable on one state tort claim and will be forced back to court on two others by a state supreme court which has bent over backwards to refuse to hear his First Amendment defenses. The Rhode Island Supreme Court's hostile

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7/ See Note, Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions, 74 Mich. L. Rev. 106 (1975); Pring, Intimidation Suits Against Citizens: A Risk for Public-Policy Advocates, Nat'l L. J., July 22, 1985, at 6, col. 1; Pell, Lawsuits That Chill Local Politics, Cal. Law., Feb. 1984, at 40; A New Kind of Hush Money, Newsweek, June 3, 1985, at 61; Pell, Libel as a Political Weapon, The Nation, June 6, 1981, at 1.

attitude toward DeLeo's exercise of his First Amendment rights is graphically evidenced by its finding that DeLeo's statement after an early administrative hearing that, "this encounter would be the first of fifty battles, if necessary, to continue to oppose appellees' enterprise," demonstrated his malicious intent. App. A at 11a; 546 A.2d at 1347. True to his word, DeLeo is now before this Court to vindicate his right to speak out on the public trust doctrine before state authorities unwilling to address or enforce it. Such tenacity, far from meriting rebuke, should be supported and protected as the epitome of robust speech on a matter of public concern.

Finally, the fundamental constitutional guarantee that an aggrieved party is entitled to the independent judgment of some court on a constitutional challenge to governmental conduct (cf. St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 84 (1936)

(Brandeis J. concurring); Crowell v. Benson, 285 U.S. 22, 46 (1932); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)) mandates summary reversal or that the Court accept this case and afford it plenary review. Otherwise, DeLeo's due process and First Amendment challenges to the arbitrary opinion of the Rhode Island Supreme Court will go unheard by any court. This is a profoundly unsettling result entailing adverse systemic consequences. DeLeo, unaware and incapable of challenging the unconstitutionality of the Rhode Island Supreme Court's refusal to hear his First Amendment defenses until receiving that court's opinion, raised his constitutional due process claims at the earliest possible opportunity -- on petition for reargument filed within five days of receipt of the opinion, App. B at 12a, but that court denied the petition without any explanation or discussion whatsoever. App. C at 65a. This Court, then, provides the

first and only real opportunity for DeLeo to present his claim of constitutional deprivation before a court of competent jurisdiction.

II. THIS COURT HAS JURISDICTION

The fact that the Rhode Island Supreme Court did not explicitly cite its Rule 3(c) in holding that, because DeLeo's "claim of appeal is specifically directed at the counterclaim phase of this dispute ... the merits of the 1982 adjudication will not be considered by this Court," App. A at 5a; 546 A.2d at 1345-46, is no bar to this Court's jurisdiction to hear this appeal pursuant to 28 U.S.C. §1257(2). A close reading of the Rhode Island Supreme Court's opinion clearly demonstrates that Rule 3(c) provided the grounds for its determination to refuse to review DeLeo's extensively briefed First Amendment defense of truth. Corn Products Refining Co. v. Eddy, 249 U.S. 427, 432 (1919); Western Union Tel. Co. v. Kansas,

216 U.S. 1, 26 (1910); McCullough v. Virginia, 172 U.S. 102, 116 (1898). Rule 3(c) recites that the notice of appeal "shall designate the judgment, order or decree or part thereof appealed from." App. N at 120a. The Rhode Island Court's refusal to review the merits (i.e., the truth) of DeLeo's public trust claims as a First Amendment defense[8] because "his claim of appeal" was only directed at the counter-claim phase of the dispute not only tracks the language of Rule 3(c), but is also a paraphrase of appellees' argument on appeal that DeLeo's failure to appeal the dismissal of his complaint bars him from asserting the validity of his legal claim as a First Amendment slander defense under Rule 3(c). App. K at 100a. Moreover, DeLeo's

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8/ At no point in his brief before the Rhode Island Supreme Court did DeLeo raise the merits of his claim (i.e., its truth) offensively. DeLeo's posture on appeal was entirely defensive and directed toward overturning the substantial damage judgment incurred.

challenge to the constitutionality of Rule 3(c) was raised before the Rhode Island Supreme Court at the earliest opportunity -- as soon as that court applied the rule to preclude review of DeLeo's defenses -- and was unmistakable and explicit. App. B at 27a. Accordingly, the Rhode Island Supreme Court has upheld its interpretation of Rule 3(c) against a constitutional challenge as required under section 1257(2).

It has long been settled by this Court that section 1257(2) encompasses statutory enactments which are facially innocuous but constitutionally infirm as applied to an individual litigant. See Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290 (1921). So, too, the fact that the challenged state legislation is a rule promulgated by the Rhode Island Supreme Court is not a bar to Section 1257(2) review. The rule was promulgated under Section 8-6-2 of the General Laws of Rhode

Island, which gives it the force and effect of a statute. Letendre v. Rhode Island Hosp. Co., 74 R.I. 276, 60 A.2d 471, 474, (1948). It is, therefore, a statute within the meaning of section 1257(2). New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U.S. 18, 31 (1888); Williams v. Bruffy, 96 U.S. 176, 183 (1878).

Furthermore, the Rhode Island Supreme Court's application of Rule 3(c) to DeLeo, to the effect that a litigant may be precluded on appeal from a determination of his legal claim as a defense merely because he has chosen not to pursue it offensively, did not exist before that court so held on appeal in this case. Given the plain language of Rules 3(c) and 4 belying this unusual interpretation and the lack of any precedent supporting it, the interpretation and its effect were entirely novel and could not have been challenged by DeLeo prior to

that court's August 24, 1988 decision. The fact, therefore, that he raised his constitutional challenge for the first time in his Petition for Reargument to the Rhode Island Supreme Court, App. B at 21a, which denied it summarily on September 21, 1988, does not invalidate this appeal, since he raised the challenge at the earliest possible opportunity.[9] Pruneyard Shipping Center v. Robins, 447 U.S. 74, 86, n. 9. (1980); Herndon v. Georgia, 295 U.S. 441, 444

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[9] The constitutionality of the Rhode Island Supreme Court's application of Rule 3(c) to DeLeo was not an issue properly before that court until it actually applied Rule 3(c) to DeLeo in its August 24, 1988, decision. To require, for purposes of reviewing the constitutionality of that court's application of Rule 3(c) here, that DeLeo have anticipated that court's determination and prematurely challenged its constitutionality, is incompatible with this Court's decisions requiring that a constitutional challenge be ripe before it is adjudicated. Cf. Williamson Cty. Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 n.13 (1985); and this Court's determination that original federal jurisdiction cannot be acquired by raising an anticipatory constitutional challenge to an adversary's defense on a state law claim. Cf. Louisville and Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152, 153 (1908).

(1935); Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 367 (1932); Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 678 (1930); Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320 (1930); Saunders v. Shaw, 244 U.S. 317, 320 (1917).

The judgment for slander of title is final for purposes of review in this Court. Execution of the judgment is being stayed only pending the outcome of proceedings here. Nor does the Rhode Island Supreme Court's remand to the trial court for further proceedings on appellees' abuse of process and malicious use of process counterclaims affect finality for purposes of this appeal. The Rhode Island Supreme Court's ruling that collateral estoppel bars any defensive use of the public trust doctrine by DeLeo will be binding on the lower court when those counterclaims are addressed on remand. But DeLeo has only one

defense to these counterclaims: the fact that his lis pendens filings were reasonably supported by the applicable public trust law which DeLeo relied upon in making his claims and therefore, were made with probable cause under Rhode Island law (Nagy v. McBurney, 392 A.2d 365 (1978)), and constitute First Amendment protected speech on a matter of pressing public concern under Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1979); and under McDonald v. Smith, 472 U.S. 479, 485 (1985) as petitioning activity before governmental bodies. See Section IV.A. below. Since this, his only defense, has already been denied him, judgment against him on remand in the trial court is preordained, and the judgment which will inevitably enter against him on those counterclaims will return to this Court for review under the United States Constitution on the very same grounds as presently before the Court. Consequently, the judgment is

final at this time for purposes of review in this Court under 28 U.S.C. §1257(2). Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479 (1975); Mills v. Alabama, 384 U.S. 214, 217-18 (1966); Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 382 (1953).[10]

Moreover, this Court is not precluded from passing on DeLeo's First Amendment defenses in its exercise of certiorari review even if it finds that the Rhode Island Supreme Court's arbitrary interpretation of Rule 3(c) does not offend due process. Due process aside, the Rhode Island Supreme Court's interpretation of

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10/ Even if this Court were to find a lack of finality with respect to the Rhode Island Supreme Court's determination on the abuse of process and malicious use of process claims, still it should accept review of the final judgment on the slander of title claim. If the Court does not do so, Nunes will obtain immediate execution. In these circumstances appellate review in this Court is proper. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 126 (1945); Carondelet Canal and Navigation Company v. State of Louisiana, 233 U.S. 362, 372 (1914); Forgay v. Conrad, 161 U.S. 653, 655-56 (1897).

Rule 3(c) cannot possibly provide an adequate and independent state ground for its decision to ignore DeLeo's First Amendment defense of truth. DeLeo complied, in both substance and form in every real sense, with Rhode Island Supreme Court Rule 3(c) by making a timely appeal from the final judgment entered against him on appellees' slander of title counterclaims and by identifying his claims of error with specificity in his pre-briefing statement as required by Rhode Island Supreme Court Rule 16(h).[11] This being so, "a simple recitation that there has been no observance of [the] procedural rule" cannot thwart review of the deprivation of fundamental constitutional rights in this Court. N.A.A.C.P. v. Alabama, 377 U.S. 288, 297

11/ In determining whether a purported state ground is adequate and independent, this Court may undertake an "attentive examination" of the facts underlying it. Ancient Egyptian Order of Nobles, 279 U.S. at 746.

(1964); Staub v. City of Baxley, 355 U.S. 313, 318-20 (1958).

Furthermore, since the interpretation of Rhode Island Supreme Court Rule 3(c) invented for this case finds no support in prior Rhode Island case law and is entirely novel, it could not have been anticipated and complied with by DeLeo. It is therefore inadequate to preclude review of constitutional questions by this Court. See N.A.A.C.P. v. Alabama, 377 U.S. at 297; N.A.A.C.P. v. Alabama, 357 U.S. 449, 457-58 (1958); Brinkerhoff-Faris, 281 U.S. at 680-81; Wright v. Georgia, 373 U.S. 284, 291 (1963); see also Henry v. Mississippi, 379 U.S. 443, 448, n.3 (1965).

Given that the effect of its novel interpretation of Rule 3(c) has been the self-imposed abstention by the Rhode Island Supreme Court from addressing the merits of DeLeo's entire case on appeal, which was

dedicated to the public trust doctrine as a First Amendment defense, it is arguable that the Rhode Island Supreme Court has invoked its novel interpretation "in a spirit of evasion for the purpose of defeating the claim of federal right." Atlantic Coast Line R. Co. v. Mims, 242 U.S. 532, 535 (1917); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960). Review in this Court should not be foreclosed in such circumstances. Moreover, the Rhode Island Supreme Court's unique invocation of the doctrine of collateral estoppel -- under which it asserted its inability to address DeLeo's public trust doctrine claims as a defense in any way (i.e., to address the reasonableness of his speech as a defense to the compensatory damage award and lack of actual malice as a defense to the punitive damage award) because the claims in the form of a complaint were dismissed by a lower court in the same case -- does not provide an

adequate and independent state law ground. Postal Telegraph Cable Company v. City of Newport, Kentucky, 247 U.S. 464, 475-76 (1918). See Section III.B. below.

Finally, it is no valid objection to this Court's jurisdiction to argue that, even if DeLeo's legal claims regarding the public's interest in appellees' lands were true, reasonable, and without actual malice, there was sufficient evidence in the record to support the jury verdict. Under Rhode Island law, an essential element of slander of title is a knowingly false statement. Hopkins v. Drowne, 41 A. 567, 568 (1898). If, then, DeLeo's legal claims concerning the public's interest in the land were not knowingly false, he cannot be liable for slander on the basis of these statements, no matter what evidence of motive can be

gleaned from the record.[12] Similarly, motive is irrelevant under the controlling precedents of this Court. See Section IV.A. below. See also United Mine Workers v.

12/ The Rhode Island Supreme Court did hold that a finding of malicious motive could be supported by the fact that DeLeo physically interfered with construction of the parcel, called police to the development, complained to the press, and objected to every step of the development process. App. A at 108a-118a; 546 A.2d at 1346-47. However, the only evidence of falsity cited by that court was DeLeo's claim to a personal interest in the triangular piece. Such evidence cannot provide an independent and adequate state law ground for the judgment. The Rhode Island Supreme Court never determined this claim to be false, knowingly or otherwise. In fact, it specifically declined to review the relevant Rhode Island case law addressing ownership of filled tidelands. But even assuming this claim were knowingly false, still it cannot provide an adequate and independent ground for the judgment. The jury verdict was general. It is impossible to determine whether it rested on the bulk of DeLeo's statements about the public trust or the isolated claim to a small piece of land whose commercial worthlessness is graphically demonstrated by the fact that appellees had it removed to provide landfill for other portions of the property. The judgment, resting as it does on a general verdict, is ambiguous and obscure, and the remote hypothetical possibility that it rested solely on DeLeo's personal claim cannot stand as a barrier to a determination by this Court of the validity of the judgment under the federal constitution. Michigan v. Long, 463 U.S. 1032, 1040-42 (1983); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

Pennington, 381 U.S. 657, 670 (1965). Accordingly, when a state court decision, as here, appears to violate federal law, is interwoven with questions of federal law, and "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court has jurisdiction. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).

III. DUE PROCESS

A. The Application of Rhode Island Supreme Court Rule 3(c) to DeLeo In This Case to Preclude Him From a Determination of His First Amendment Defenses Violated His Due Process Rights.

While a state need not provide a system of appellate review as of right at all, if it does so, such a system must accord with due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). And in light of the fact that "due process requires that there be an opportunity to present every available defense," American Surety Co. v. Baldwin, 287 U.S 156, 168 (1932), a rule of appellate

procedure which can work to foreclose such defenses cannot pass muster under the due process clause unless it serves an important judicial interest and gives clear notice to the litigants. Thomas v. Arn, 474 U.S. 140, 155, (1985); see also Henry v. Mississippi, 379 U.S. 443, 448, n.3 (1965); Monger, 405 U.S. at 960.

Given these standards, the retroactive application of a novel, arbitrary and unforeseeable interpretation of a state procedural rule by a state supreme court to refuse consideration of a meritorious legal defense, not merely under state law but under federal constitutional law as well, violates due process in its primary sense -- a meaningful opportunity to be heard -- and mandates this Court's review of the federal constitutional question. Michel v. Louisiana, 350 U.S. 91, 93 (1985); Bouie v. Columbia, 378 U.S. 347, 354 (1964); Brinkerhoff-Faris 281 U.S. at 681; Central

Union Telephone Co. v. City of Edwardsville, 269 U.S. 190, 194-95 (1925); Hill, The Inadequate State Ground, 65 Columbia Law Rev. 943, 961 (1965).

The procedural trap sprung by the Rhode Island Supreme Court to deny DeLeo appellate review on a First Amendment defense under the guise of its Rule 3(c) is enunciated in a single terse sentence unsupported by any case law, App. A at 5a; 546 A.2d at 1345-46; and runs counter to the clear language of Rules 3(c) and 4. See N.A.A.C.P. v. Alabama, 377 U.S. at 297. It was novel and unanticipated, yet applied retroactively and uniquely to DeLeo. Compare, Thomas v. Arn, 474 U.S. at 144-45. Moreover, the Rhode Island Supreme Court's application of Rule 3(c) manifestly serves no legitimate state interest. The requirement that DeLeo must check a box on a standardized notice of appeal form labeled "Dismissal Merits" in order to raise a legal defense to the

judgment he is appealing, even though he is not appealing the dismissal of his complaint, is entirely irrational, especially in light of the particularized pre-briefing statement required by Rule 16(h). App. N at 125a. See Foman v. Davis, 371 U.S. 178, 181 (1962) (failure by appellant to indicate in notice of appeal all findings below objected to did not preclude him from raising findings not specifically indicated absent prejudice to appellee);[13]

13/ In Foman the Court specifically found an absence of prejudice where appellant had not only briefed the issue not specifically designated in the notice of appeal but had also listed it in his pre-briefing statement submitted to the appellee and the Court. 371 U.S. at 181. Here, too, DeLeo briefed the public trust doctrine and First Amendment issues on appeal to the Rhode Island Supreme Court and listed them in the pre-briefing statement submitted to the court and appellees as required by Rule 16(h). The decision in Foman v. Davis, although specifically addressed to the Federal Rules of Civil Procedure, has undeniable applicability to Rhode Island Supreme Court Rule 3(c). See Kent, Rhode Island Practice §73.5, n.49 (1969) (specifically embracing the rule of Foman v. Davis that the technical niceties of perfecting a notice of appeal

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B. The Rhode Island Supreme Court's Application of the Doctrine of Collateral Estoppel to Preclude DeLeo from Raising the Public Trust Doctrine as a Constitutional Defense Violated DeLeo's Due Process Rights.

Under Rhode Island law, "collateral estoppel makes conclusive in a subsequent action on a different claim the determination of particular issues actually litigated in a prior action as long as the issues are identical, the prior judgment was final and the individual who is the subject of the estoppel was a party or in privity with a party in the prior action." Cole v. Charron, 477 A.2d 959, 961 (R.I. 1984) (emphasis supplied). In the decision appealed from, however, the Rhode Island Supreme Court cited Cole v. Charron for the very different and entirely unprecedented

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13/ (Footnote Continued From Previous Page)

under Rule 73(b) should not be employed to preclude substantial justice.) Rule 73(b) preceded and contains substantially the same language as current Supreme Court Rule 3(c).

proposition that "the 1982 unappealed [interlocutory] order of dismissal [of DeLeo's complaint by the trial court] also estops DeLeo from attempting to invoke the so-called public trust doctrine as a defense to the slander-of-title counterclaims filed by Nunes and Appleton." App. A at 5a-6a; 546 A.2d at 1345-46. In so holding, the Rhode Island Supreme Court has distorted the doctrine of collateral estoppel into an inequitable device for frustrating legitimate appellate constitutional review.

Counsel knows of no case in any American jurisdiction holding that the doctrine of collateral estoppel applies to arguably erroneous determinations of law made pursuant to an interlocutory order at the trial level which are then presented for correction on appeal to a higher court in the same case. Moreover, for collateral estoppel to apply, the prior and subsequent issues must be identical. The Rhode Island

Supreme Court ignored this well settled rule in holding that the trial judge's vacation of DeLeo's lis pendens filings, on the supposed ground that the public retained no interest in appellees' filled tidelands, "estops" DeLeo from presenting a defense to a slander of title judgment which would establish that his statements concerning the reach and application of the public trust doctrine -- a matter of vital public concern -- were, at the very least, reasonably and non-negligently made, and not knowingly or recklessly false.

This bizzare application of the doctrine of collateral estoppel, sprung upon DeLeo retroactively and without notice denies him the right to challenge the punitive damage component of the slander judgment because his arguments on a matter of public concern were not knowingly or recklessly false; Gertz, 418 U.S. at 349; and to challenge the compensatory damage

component because his arguments were made without fault (i.e., they were reasonable given the applicable public trust law). Id. at 347. In addition, DeLeo has been deprived of his right to defend his speech on the ground that it is protected petitioning activity. McDonald v. Smith, 472 U.S. at 485 (1985). See Section IV.A. below. He has also been deprived of his right to have a reviewing court independently scrutinize the entire record below in determining the validity of his First Amendment defenses. See Rankin v. McPherson, 107 S.Ct. 2891, 2897, n.9 (1987); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508, 510 (1984); Pennekamp v. Florida, 328 U.S. 331, 335 (1946). See Section III.C. below. This unprincipled judicial abstention cannot possibly comport with due process. Postal Telegraph Cable Co. v. City of Newport, Kentucky, 247 U.S. at 475-76 (1918) (state application of collateral estoppel in

contradiction to "universally accepted" estoppel principles violates due process).

C. The Holding of the Rhode Island Supreme Court that the Evidence Sufficiently Supported the Slander Judgment Without the Court's Having Conducted a Searching Review of the Record Offends Due Process

Despite its refusal to review the truth, reasonableness and lack of actual malice of DeLeo's explicitly raised and extensively briefed public trust doctrine claims, the Rhode Island Supreme Court inexplicably found, under Rhode Island law (which requires a finding of actual malice, defined as a knowing falsehood, to support a judgment for slander of title, Hopkins v. Drowne, 41 A. 567, 568 (1896)) that the record was "replete" with evidence which would sustain a finding of malice. App. A at 10a; 546 A.2d at 1346. Such a truncated judicial review, made without considering DeLeo's arguments of truth, reasonableness and lack of knowing or reckless falsity

squarely violates this Court's holding in Bose Corp. v. Consumers Union of U.S. Inc., 466 U.S. 485, 510, 511 (1984). Bose requires searching and independent appellate review as a requirement of federal constitutional law where the question at issue is one of alleged trespass across the lines between speech unconditionally guaranteed and speech which may legitimately be regulated.[14]

Applying the Bose standard of review, the judgment of the Rhode Island Supreme

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14/ Any lingering doubt that the Court's holding in Bose should be limited to reviewing findings of actual malice in defamation cases has been dispelled by the Court's opinion in Rankin v. McPherson, 107 S.Ct. 2891, 2897, n.9 (1987). See also Don's Porta Signs, Inc. v. City of Clearwater, 99 L.Ed. 2d 491 (1988) (White, J., dissenting from denial of petition of writ of certiorori). And in any case, a finding of actual malice is constitutionally required to support the punitive damage award in this case involving speech on a matter of public conern, Gertz, 418 U.S. at 349, and is arguably required to support any judgment for petitioning activity, McDonald v. Smith, 472 U.S. at 490 (Brennan, J., concurring). See Section IV.A. below. Nor can it be credibly maintained that the standard of review established in Bose is not applicable to state courts. Bose, 466 U.S. at 499.

Court is multiply infirm. First, that court's determination that the record evidence could sustain the judgment without considering DeLeo's First Amendment defense of truth, reasonableness and lack of knowing or reckless falsity defies this Court's command in Bose that a reviewing tribunal may not decline to examine the full record in a slander case involving speech on a matter of public concern to determine whether that speech deserves First Amendment protection. Second, by rubber stamping the trial court's pretrial ruling of law which was based on dicta in a nineteenth century Rhode Island case, see Section IV.C. below, without a shred of independent inquiry and by arbitrarily awarding it unprecedented collateral estoppel effect, the Rhode Island Supreme Court has failed to discharge its constitutional duty to exercise independent judicial review on legal issues involving the applicability of First Amendment protection

to allegedly slanderous speech. See also Rankin v. McPherson, 107 S.Ct. 2891, 2897, n.9 (1987) (suggesting that Bose standard applies a fortiori to questions of law).

The Rhode Island Supreme Court thus failed to afford DeLeo the process due him under Bose by finding facts and making legal conclusions without reference to applicable First Amendment standards. Accordingly, this Court should undertake an independent review of the record. Cox v. Louisiana, 379 U.S. 536, 545, n.8 (1965); Norris v. Alabama, 294 U.S. 587, 590 (1935); Fiske v. Kansas, 274 U.S. 380, 385, 386 (1927). See also Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).[15]

15/ DeLeo asks that this Court review only so much of the record as is necessary to make a traditionally legal determination -- whether his legal claims under the public

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IV. THE FIRST AMENDMENT

A. The Applicable Principles

Questions concerning the public's interest in land under the public trust doctrine are of paramount public concern, both nationally and under Rhode Island law. Illinois Central Railroad v. Illinois, 146 U.S. 387, 455 (1892) (ownership of public trust lands "is a subject of public concern") (emphasis supplied); Rhode Island

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15/ (Footnote Continued From Previous Page)

trust doctrine were reasonable given his reliance on the then existing state of the law. In the usual defamation case, the propriety of factual statements, and not legal claims is at issue. In such cases, the existence of actual malice is aptly classified as a question of fact. See Harlow v. Fitzgerald, 457 U.S. 800, 816, n.27 (1982). Here, however, the propriety of the disputed public trust claim is determined by the reasonableness of the claim given the then existing law, Nagy v. McBurney, 392 A.2d 365, 368 (R.I. 1978), and is a question of law from the outset. Stewart v. Sonnenborn, 98 U.S. 187, 194 (1878). See Harlow v. Fitzgerald, 457 U.S. at 818 (reasonableness of legal interpretation to be determined by judge as question of law).

Constitution, Article I, Section 17 (guaranteeing to the people "the privileges of the shore"). Accordingly, DeLeo's petitioning efforts to vindicate the public interest in appellees' filled tidelands are precisely the kind of speech on matters of public concern that is at the heart of the First Amendment's protection. First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978); Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 758, 759 (1985). Since DeLeo's statements concerning the public trust are true, Philadelphia Newpapers v. Hepps, 475 U.S. at 776-777 (1986), or at the very least were reasonable and non-negligent given the then existing body of law on the public trust doctrine, and thus made without fault[16],

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16/ The Court's holding in Gertz, 418 U.S. at 347, that states may not "impose liability without fault" in cases involving matters of public concern made by private individuals has been interpreted by the

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they are squarely protected under the First Amendment and cannot form the basis for a state law defamation judgment for

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Rhode Island Supreme Court and elsewhere to require at least a showing of negligence as to the truth or falsity of the statement. De Carvalho v. Da Silva, 414 A.2d 806, 812, 813 (R.I. 1980) Sunward Corp. v. Dun & Bradstreet, 811 F.2d 511, 527 n.14 (10th Cir. 1987); Lerman v. Flynt Distributing Co., Inc. 745 F.2d 123, 136 (2d Cir. 1984); Ollman v. Evans, 713 F.2d 838, 845 n.62 (D.C. Cir. 1983), rehearing en banc, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127 (1985); Littlefield v. Fort Dodge Messenger, 614 F.2d 581, 584, n.4 (8th Cir.), cert. denied, 445 U.S. 945 (1980); Carson v. Allied News Co., 529 F.2d 206, 214 (7th Cir. 1976); Restatement (Second) of Torts, §580B, Comment c, p. 223, Comment d, p. 225; §652E, Caveat and Commentary d, p. 398 (1976). See also Herbert v. Lando, 441 U.S. 153, 160 (1979); Time, Inc. v. Firestone, 424 U.S. 448, 464 (1976) (Powell J., concurring). Negligence is measured against the standard of conduct of a reasonable person under like circumstances. Restatement (Second) of Torts §580B, Comments g and h. And under Rhode Island law, whether a litigant is justified in making a legal claim is determined by its reasonableness in light of the applicable law. Nagy v. McBurney, 392 A.2d 365, 368. See also Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc., 474 A.2d 436, 440 (R.I. 1984); Lawton v. Vadenais, 122 A.2d 138, 141 (R.I. 1956).

compensatory damages.[17] Gertz v. Robert Welch, Inc., 418 U.S. at 347; Dun & Bradstreet, Inc., 472 U.S. at 751.[18]

17/ While it is true that slander of title is an aspersion on one's property and defamation an aspersion on the person himself, Warren v. Bank of Marion, 618 F. Supp; 317, 320 (W.D. Va. 1985), it is not always easy to distinguish between the two actions because it might be possible to imply some accusation of personal inefficiency, incompetence or reprehensibility in nearly every imputation directed against title to property. W. Keeton, Prosser & Keaton on Torts §128 (5th Ed. 1984). Nor can the application of First Amendment protection to speech which slanders title be denied because such speech concerns commercial or economic matters or is in the economic interest of the speaker or the audience, especially where, as here, the speech in question furthers an important societal interest and "conveys information of potential interest and value to a diverse audience." Bigelow v. Virginia, 421 U.S. 809, 822 (1975); First National Bank of Boston v. Bellotti, 435 U.S. at 783; see also Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. at 787-88 (Brennan, J., dissenting). It should also be noted that insofar as DeLeo's statements are merely legal opinions and not factual allegations, they are absolutely protected under the First Amendment. See Gertz v. Robert Welch, Inc., 418 U.S. at 339.

18/ The fact that DeLeo is an individual and not a newspaper publisher does not disqualify his statements from First Amendment protection under Gertz. See First National Bank of Boston, 435 U.S. at 778, 782; Dun & Bradstreet, 472 U.S. at 773 (White, J., concurring in the judgment); at 781 (Brennan, J., dissenting); Philadelphia Newspapers 475 U.S. at 779-80 (Brennan, J., concurring). While it is true

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Further, the burden should fall on appellees to prove such fault or negligence. Philadelphia Newspapers, 475 U.S. at 776, 779, 780 (Brennan, J., concurring).

Moreover, DeLeo cannot be liable in punitive damages for slander of title unless his statements made in protection of the public interest in appellees' filled tidelands under the public trust doctrine show, by clear and convincing evidence, actual malice -- knowledge of falsity or

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that DeLeo did not discuss Gertz in arguing that his speech was protected under the First Amendment before the Rhode Island Supreme Court until his petition for rehearing, this aspect of the case dealing with the legal ramifications of New York Times v. Sullivan and its progeny was presented to the trial court which specifically addressed it on several occasions. See p. 10, supra. Moreover, DeLeo did discuss McDonald v. Smith, 472 U.S. 479, 485 (1985), which, in the context of speech directed toward governmental bodies, similarly holds that more than mere falsehood is required by the First Amendment to sustain a defamation judgment. The Gertz argument is merely an enlargement of the argument made under McDonald v. Smith that DeLeo's

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reckless disregard for the truth.[19] Herbert v. Lando, 441 U.S. 153, 156 (1979); Gertz, 418 U.S. at 349. DeLeo's speech in vindication of the public trust is further protected under the First Amendment because it constituted petitioning activity before judicial, legislative and administrative bodies. McDonald v. Smith, 472 U.S. at

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speech is protected absent a showing that he should have known it to be false. See Illinois v. Gates, 462 U.S. 213, 248 (1983) (White, J., concurring); Stanley v. Illinois, 405 U.S. 645, 658, n. 10 (1972); Dewey v. Des Moines, 173 U.S. 193, 197, 198 (1899). Finally, the circumstances supporting a claim of waiver must be clear and compelling where First Amendment rights are at stake. Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967).

19/ It should be noted that appellee Nunes injected himself into this public trust controversy by advertising the development and sale of public trust lands. It is arguable, therefore, that he is a limited purpose public figure and that DeLeo cannot be liable for compensatory damages to Nunes without a showing by clear and convincing evidence of actual malice. Gertz, 418 U.S. at 351. Since, however, DeLeo's statements are so clearly reasonable given his reliance on the applicable public trust law, the Court need not determine whether appellee Nunes is a public figure.

484.[20]

B. The Rhode Island Supreme Court Applied a Strict Liability Standard in Reviewing the Slander of Title Judgment under Rhode Island Law, in Violation of DeLeo's First Amendment Rights

Under Rhode Island law, actual malice -- defined as knowing falsehood -- is an essential element of slander of title. Hopkins v. Drowne, 41 A. 567, 568 (1896). While the Rhode Island Supreme Court purported to apply this standard in reviewing the judgment, in actuality it applied a strict liability standard by refusing to

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20/ DeLeo urges that this Court definitively interpret McDonald v. Smith for the proposition that a plaintiff must prove actual malice to recover in slander for expression falling within the scope of the Petition Clause, 472 U.S. at 490 (Brennan J., concurring); In re IBP Confidential Business Document Litigation, 800 F.2d 787, 789 (dissenting opinion) (8th Cir. 1986). Such an interpretation would accord with the broad privilege this Court has afforded petitioning activity in the antitrust field. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington,

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consider the truth, reasonableness or lack of knowing or reckless falsity of DeLeo's public trust arguments. This strict liability standard is plainly insufficient under the First Amendment to sustain a compensatory damage award for petitioning activities before governmental bodies and for statements on matters of public concern (see McDonald v. Smith, 472 U.S. at 484; Gertz v. Robert Welch, 418 U.S. at 345-347, 348-50) and, a fortiori, to sustain a punitive damage award for statements on a matter of public concern. Gertz, 418 U.S. at 349.

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381 U.S. 657 (1967); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). However, again, the Court need not decide this issue since DeLeo's statements concerning the public trust doctrine were so clearly reasonable in light of the applicable public trust law. Consequently, his petitioning activities are protected under either an actual malice standard or the reasonable, non-negligence standard which would otherwise apply to this speech on a matter of public concern. See In re IBP, 800 F.2d at 788.

C. DeLeo's Statements that the Public Retained an Interest in Appellees' Filled Tidelands Were True, Reasonable and Without Actual Malice and Are Therefore Protected Under the First Amendment

While the power of a state to part with property it holds in trust for the public to private persons is primarily a question of state law, Appleby v. City of New York, 271 U.S. 364, 380 (1926), such action is subject to review under federal law as "an abdication of sovereign governmental power" where the privatization amounts to "a gross perversion of the trust over the property." Id. at 394; Illinois Central Railroad v. Illinois, 146 U.S. 387, 452, 453. Rhode Island has allowed just such "a gross perversion of the trust" in filled tidelands on one of two theories. The public trust in such lands has either been impermissibly extinguished by judicial fiat as opposed to deliberate legislative action; or whatever unspecified legislative action has allegedly been taken to extinguish the public trust in

Rhode Island amounts to an impermissible privatization of all filled tidelands adjacent to harbors in the state.

Under the Constitutions of the United States and of the several sovereign states, sovereignty is vested in the people, Buckley v. Valeo, 424 U.S. 1, 14 (1976); Munn v. Illinois, 94 U.S. 113, 124 (1876); and it is the legislature which speaks for the sovereign people on questions of public welfare. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240, 244 (1984). U.S. v. UAW-CIO, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting). Thus, a state's determinations concerning the welfare and interest of the public fall within the legislative domain and are beyond the reach of judicial inquiry absent constitutional infirmity. Hawaii Housing Authority, 467 U.S. at 239, 240, 244; Berman v. Parker, 348 U.S. 26, 32 (1954); Louisville and Nashville Railroad Co. v. Kentucky, 161 U.S. 677, 701

(1896). State legislatures and not state judiciaries, must act as the primary fiduciary for public lands entrusted to the states. U.S. v. 1.58 Acres of Land, 523 F.Supp. 120, 123 (D. Mass. 1981); Opinion of the Justices, 383 Mass. 895, 902, 424 N.E.2d 1092, 1100-01 (1981); Marks v. Whitney, 491 P.2d 374, 381 (Cal. 1971); Kootenai Environ. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1091 (Idaho 1983). See also State v. Village of Lake Delton, 286 N.W.2d 622, 629 (Wisc. App. 1979). "It is not for the courts to say how that trust shall be administered." Light v. U.S., 220 U.S. 523, 537 (1911); Opinion of the Justices, 383 Mass. 895, 902, 424 N.E.2d 1092, 1100-01 (1981); Note, "The Public Trust in Tidal Areas," 79 Yale Law Rev. 762, 786 (1970).

The Rhode Island Legislature has never, in its sovereign capacity, acted to extinguish the public trust interest in appellees' filled tidelands. Nor has it

ever said that the mere establishment of a harbor line gives an upland owner the right to fill out to the harbor line in a way which extinguishes all public right and access to the filled land. Any such pronouncements in the nineteenth century Rhode Island cases relied on by the Rhode Island courts in this case -- see e.g., Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895) -- are, in addition to being dicta (see Jackvony v. Powell, 67 R.I. 218, 226, 21 A.2d 554, 557 (1941)), exclusively judicial and thus constitute, under federal law, an impermissible extinguishment of public rights through an "abdication of sovereign governmental power." The judiciary simply cannot undertake to speak for the legislature and the people as a whole in this area. Furthermore, if in fact the mere delineation of a harborline by the Rhode Island legislature did authorize, as a matter of legislative intent, upland owners

to fill out to the harborline and extinguish the public's rights to such filled lands, such action would be tantamount to privatizing all harbor lands in Rhode Island and would constitute precisely the kind of sweepingly impermissible abuse condemned in Illinois Central, 146 U.S. at 452 (calling into question privatization of all Chicago's harborlands).[21]

These precedents clearly demonstrate the eminent reasonableness, if not the truth, of DeLeo's claims that the public retains a valid interest under the public trust doctrine in appellees' filled tidelands. See, e.g., Nagy v. McBurney, 392 A.2d 365, 368 (R.I. 1978); Harlow v. Fitzgerald, 457 U.S. at 800, 815-19.

21/ In fact, the Rhode Island Supreme Court has never ruled that public trust rights are extinguished when tidelands are filled. It has only held that the establishment of a harborline is a license to the riparian landowner to fill out to the

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The reasonable and non-actionable nature of DeLeo's belief that the public retained an interest in appellees' filled tidelands is also underscored by the fact that the lower federal courts have interpreted Illinois Central to mean that public access to trust lands survives even where a proper legislative grant has been made. City of Alameda v. Todd Shipyards Corp.,

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harbor line. Engs v. Peckham, 11 R.I. 210, 224 (1875). The question of the landowner's interest in such filled land has been explicitly left open: "Whether the riparian proprietor who has filled out or wharfed out has as against the state the same absolute dominion over the wharf and new-made land as over his upland is a question we need not now deter- mine." Id. at 225. Language in Allen v. Allen, 19 R.I. 114, 115 (1895), which suggests that public rights are extinguished by filling out to the harborline, was specifically characterized as non- binding dictum in the later case of Jackvony v. Powell, 67 R.I. 218, 226, 21 A.2d 554, 557 (1941). And in Dawson v. Broome, 24 R.I. 359, 372 (1902), the Court ignored Allen v. Allen entirely and followed Engs v. Peckham, supra, in explicitly declining to determine the exact nature of a riparian owner's title to filled tidelands.

632 F. Supp. 333, 336 (1986); U.S. v. 1.58 Acres of Land, 523 F. Supp. 120, 124 (D. Mass. 1981). Courts have further interpreted Illinois Central to require that any legislative conveyance of public trust lands to private persons must be for a public purpose. E.g., Boston Waterfront Development Corp. v. Commonwealth, 378 Mass. 629, 647, 393 N.E. 2d 356, 365-66 (1979); National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709, 722 (Cal.), cert. denied sub nom, Los Angeles Dept. of Water and Power v. National Audubon Soc., 464 U.S. 977 (1983); City of Berkeley v. Superior Court of Alameida County, 606 P.2d 362, 370 (Cal.), cert. denied sub nom, Santa Fe Land Improv. Co. v. Berkeley, 449 U.S. 840 (1980); Morse v. Oregon Division of State Lands, 590 P.2d 709, 711 (Or. 1979); Thomas v. Sanders, 413 N.E.2d 1224, 1231 (Ohio App. 1979); State of Vermont v. Central Vermont Railway, Inc., Chittendon

Super. Ct. No. 5966-84 CnC (Sept. 23, 1987); Kootenai Environ. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1089 (Idaho 1983). Finally, even a sovereign grant is revocable when the public purpose supporting it is no longer served. Boston Waterfront Development Corp., 378 Mass. at 647, 649.

Given this abundant precedent, it is clear that DeLeo's statements[22] made in vindication of the public trust doctrine were, if not actually true, at the very least eminently reasonable, and that they cannot under the Constitution form the basis for either a compensatory or a punitive damage award against him on appellees' slander of title, malicious use of process and abuse of process counterclaims.

22/ There was ample evidence at trial indicating that DeLeo was thoroughly conversant with the applicable law on the public trust doctrine, had retained legal experts to advise him and relied on this knowledge in making his legal claims. Tr. V, 106-11, 114-17, 124-26, 133. See Nagy v. McBurney, 392 A.2d at 368 (probable cause for making legal claim exists where litigant believes in the validity of his claim in reliance upon the advice of counsel).

CONCLUSION

For the foregoing reasons, the decision of the Rhode Island Supreme Court should be summarily reversed, see Parrot v. City of Tallahassee, 381 U.S. 129 (1965) (reversing summarily where state's procedural ground for refusing to entertain appellate review was not adequate and independent); or, alternatively, the Court should note probable jurisdiction and set the case down for briefing and oral argument.

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88-1013

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

RAYMOND DE LEO and ANNA A. DE LEO,
Appellants,

v.

ANTHONY A. NUNES, INC., and SALLY APPLETON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A - OPINION OF THE RHODE ISLAND SUPREME COURT

Supreme Court
No. 86-516-Appeal

Raymond DeLeo et ux. :
:
v. :
:
Anthony A. Nunes, Inc., et al. :

O P I N I O N

KELLEHER, J. In the spring of 1979 Anthony Nunes, Inc., purchased a two-and-one-half-acre parcel of waterfront property situated on the southerly side of Hope Street in the town of Bristol, in an area known as Walker's Cove. A portion of the parcel is made up of filled-in land. Early in 1980 it was decided to subdivide and develop the parcel into five lots upon which single-family residences would be built. Since the parcel abuts Narragansett Bay, Nunes was required to seek approval for his project from the Coastal Resource Management Council and the Army Corps of Engineers.

The Bristol Planning Board was also involved in the approval of the subdivision. Nunes's parcel is across the street from the residence of Raymond DeLeo and his wife, Anna. Upon hearing what was happening in the neighborhood, Raymond DeLeo made it quite clear that he is opposed to the project and expressed his opposition before a variety of government agencies. Since Mrs. DeLeo's participation in this litigation and in the events preceding it was minimal, we shall refer only to her husband, and by his last name.

In September 1981 DeLeo filed a complaint in the Superior Court, alleging ownership of the parcel adjoining the Nunes parcel and asking the court to determine the extent of his "riparian, littoral and flat rights" in the Nunes parcel. DeLeo also asked that Nunes be permanently enjoined from assigning or in

any way alienating his "rights" in the two-and-one-half-acre parcel. Subsequently Nunes responded to DeLeo's suit with a series of cross-claims.

On September 11, 1981, Nunes sold one of the five lots to Sally Appleton (Appleton). DeLeo later amended his complaint to include Appleton. Shortly after the Appleton sale, DeLeo filed a notice of lis pendens in the Bristol land records against Nunes's property. Later DeLeo filed a notice of lis pendens against the Appleton lot. These filings cast a cloud on the parcel's title. Nunes experienced difficulty in selling the remaining four lots and construction plans for the Appleton lot were put on hold.

Time marched on and in September 1982 Nunes obtained the necessary approvals that would permit the construction of the Appleton residence. In order to sell the

remaining four lots Nunes asked the Superior court to expedite the consideration of DeLeo's claim. Subsequently on October 22, 1982, a Superior Court justice ruled that DeLeo had no interest in the entire parcel and that a grant by the state and federal governments in 1933 to the parcel's previous owner had extinguished any and all public rights in the parcel. This trial justice also declared that the two lis pendens filed against the parcel were null and void. Later in December 1982 an order was entered dismissing DeLeo's complaint.

DeLeo attempted to appeal the December 1982 dismissal of his complaint to this court. In January 1983 the Superior Court, acting pursuant to Rule 11(f) of the Supreme Court Rules, dismissed his appeal without prejudice on the grounds of prematurity since the rights

and liabilities of all the litigants had not been adjudicated. In this appeal Nunes correctly points out that DeLeo has failed to take any of the appellate procedural steps necessary to preserve an appellate review of DeLeo's claim of an interest in the Nunes parcel. The record clearly indicates that at no time after the dismissal of his premature appeal did DeLeo ever file a claim of appeal from the December 1982 dismissal of his complaint. His present claim of appeal is specifically directed at the counterclaim phase of this dispute and what transpired when the counterclaims were considered in October 1985. Consequently, the merits of the 1982 adjudication will not be considered by this court. The 1982 unappealed order of dismissal also estops DeLeo from attempting to invoke the so-called public trust doctrine as a defense to the

slander-of-title counterclaims filed by Nunes and Appleton. Cole v. Charron, 477 A.2d 959, 961 (R.I. 1984).

Nunes and Appleton responded to DeLeo's complaint with a series of counterclaims in which they each sought damages for slander of title, abuse of process, and a malicious use of process. The trial on the counterclaims occurred in October 1985. After directing the verdicts in favor of DeLeo on both Nunes's and Appleton's claims for abuse of process and malicious use of process, the trial justice sent the case to the jury on the slander-of-title claim. The jury awarded Nunes $104,114 in compensatory damages and $75,000 in punitive damages. Subsequently the trial justice granted DeLeo's motion for a new trial unless Nunes filed a remittitur of all compensatory damages that were in excess of $89,421 and a

remittitur of all punitive damages that were in excess of $30,000. The jury awarded Appleton $3,000 in compensatory damages and $7,000 in punitive damages. The trial justice did not disturb this award. DeLeo is before us on appeal relative to the slander-of-title litigation. Nunes and Appleton have appealed the dismissal of their claims for damages on their abuse-of-process and malicious-use-of-process claims. Nunes also faults the trial justice's reduction of the damage award awarded him by the jury. Both cross-claimants complain about the trial justice's refusal to award a prejudgment interest on the punitive-damage awards.

Shortly before the turn of the century our predecessors in Hopkins v. Drowne, 21 R.I. 20 at 23, 41 A. 567 (1898), recognized the common-law action of slander of title. The court emphasized

that damages could be recovered in an action for slander of title upon a showing that the defendant maliciously uttered false statements about the plaintiff's ownership of real estate which resulted in the plaintiff sustaining an actual pecuniary loss. DeLeo's counsel claims that the trial justice erred in finding that DeLeo's conduct was maliciously motivated and he also complains that the trial justice erred in certain portions of his charge. We disagree.

The court in Hopkins emphasized that in using the term malice it was not using the term in its "Worst sense," but described malice as an intent to deceive or injure and emphasized that in order to establish malice, the record must present evidence of the making of a false statement that is made with full knowledge of its falsity, and for the specific purpose

of injuring the plaintiff. The trial justice in his charge quoted extensively from the Hopkins case and stressed the necessity of proof that DeLeo knew his statements were false at the time they were made. The trial justice also emphasized that an erroneous statement, in and of itself, does not justify recovery. The jury was also told that a good-faith mistake would not warrant an award of damages. Throughout the charge the trial justice emphasized that in order to find malice, the jury was required to find that DeLeo knew of the falsity of his statements as to the title and made the statements with an intent to injure Nunes and Appleton. Notwithstanding DeLeo's claims to the contrary, we believe the trial justice clearly set forth the pertinent issues which were to be resolved by the jury as it considered the respective

monetary claims arising out of the slander-of-title actions.

Again, we do not believe that the trial justice erred in denying DeLeo's motion for a new trial. In urging that there be a new trial, DeLeo asserts that there was no competent evidence that any false statements he might have made were made with malice. We disagree. The record is replete with evidence which would sustain a finding of malice. Nunes and DeLeo are building contractors who, through the years, have competed against each other. At no time prior to Nunes's involvement with the Walker's Cove parcel had DeLeo ever claimed an interest in that particular real estate. Once he learned of Nunes's intentions DeLeo physically interfered with construction of the parcel, called police to the development, complained to the press, objected to every

step of the development process, and in fact specifically claimed that he had an interest in the triangular portion of the Nunes parcel. His harassment actions continued even after his complaint had been dismissed by the Supreme Court in December 1982.

Early in this dispute DeLeo, after his efforts had proved unsuccessful, told Nunes that this encounter would be the first of fifty battles, if necessary, to continue to oppose Nunes's enterprise. The trial justice noted that this attitude epitomized the whole character of DeLeo's determination to do whatever had to be done by "fair" or "foul means" to thwart the Walker's Cove transformation. We endorse the sentiments expressed by the trial justice.

We now turn to the appeals of Nunes and Appleton.

Nunes and Appleton contend that DeLeo's filing of the lis pendens against their lots constitutes both an abuse of process and malicious use of process. In Nagy v. McBurney, 120 R.I. 925, 392 A.2d 365 (1978), we stated that in order for a plaintiff to sustain an action for abuse of process, he or she must demonstrate that (1) the defendant instituted proceedings or process against the Plaintiff and (2) the defendant used these proceedings to obtain an ulterior or wrongful purpose for which the proceedings were not designed.

The tort of malicious prosecution, or malicious use of process as it is sometimes called, was also discussed by this court in Nagy. The court stated that "[i]t may be defined as a suit for damages resulting from a prior criminal or civil legal proceeding that was instituted

maliciously and without probable cause * * *." Nagy, 120 R.I. at 929, 392 A.2d at 367.

Abuse of process differs from malicious prosecution or malicious use of process in that the gist of the tort is not in commencing an action or causing process to issue without justification but in misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish.

Here Nunes and Appleton contend, and we agree, that DeLeo did institute process against them by filing the lis pendens against their respective properties. See Grasso v. Byrd, 417 A.2d 911 (R.I. 1980). However, they argue that DeLeo did not file process to preserve the right to assert a property interest; rather he filed process as part of a comprehensive, malicious effort to derail the parcel's

development, which action constitutes an abuse of process. They also claim that there was sufficient evidence of DeLeo's malice in this regard.

We agree. In reviewing a directed verdict, this court views the evidence in a light most favorable to the plaintiff to determine whether any competent, credible evidence supports the plaintiff's claims. If so, the direction constitutes error. Achille v. Colonial Penn Insurance Co., 505 A.2d 1173 (R.I. 1986). We believe that the trial justice did err in directing verdicts for DeLeo when there was competent, credible evidence that would support both the claim of an abuse of process and the claim of a malicious use of process.

When the term malice is used within the context of a claim for malicious prosecution or a malicious use of process there is no necessity of proving ill will but there must be a showing that the defendant's actions

were primarily motivated by ill will or hostility. Nagy, 120 R.I. at 929, 392 A.2d at 367.

There is ample evidence that DeLeo's continuous and lengthy efforts to block the development of Nunes's five-lot parcel was motivated by the ill will and hostility he has for his competitor Nunes. Earlier in this opinion we alluded to several incidents which manifest these sentiments. There are other episodes which give further proof of this fact. DeLeo, in his communications to third parties, described Nunes as "crafty" and "brazen," and he accused his fellow contractor of somehow engaging in a "conspiracy" to circumvent the applicable regulations. As a contractor himself DeLeo knows or should have known that the filing of a lis pendens can become a pernicious practice that has the same effect as attaching one's property without the benefit

of a court hearing. A real estate expert testified that any property "encumbered" by a lis pendens is "unmarketable" because the property would never be sold so long as the lis pendens remained in effect. Filing such a document without a colorable claim is done at the filer's peril. These actions on DeLeo's part, while directed mainly towards Nunes, also had a direct impact on the Appleton lot. Consequently we believe that the jury should have been allowed to consider Nunes's and Appleton's claims.[1]

The remaining issues relate to the trial justice's reduction of the jury's punitive-damage award to Nunes and his rejection of Nunes's and Appleton's request that prejudgment interest be added to the

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1/ In recognizing that Nunes and Appleton can prosecute their claims for an abuse of process and a malicious use of process, it should be noted that on remand they assume the burden of showing that the damages they seek were not any part of the awards approved by the trial justice.

punitive-damage awards. The trial justice, in reducing the $75,000 punitive-damage award to $30,000, described the jury's award as "grossly excessive." He pointed out that the award was approximately 10 percent of DeLeo's net worth and also observed that such an amount was not needed to deter DeLeo or others from conducting themselves similarly in the future. A trial justice may set aside the amount of an award of punitive damages awarded by a jury only if the amount clearly appears to be excessive or to represent the passion and prejudice of the jury rather than their unbiased judgment. Mazzaroppi v. Tocco, 533 A.2d 203 (R.I. 1987). On this record we cannot fault the trial justice's reduction.

In denying Nunes and Appleton any prejudgment interest on their punitive-damage awards, the trial justice was responding to a post trial motion made by

DeLeo. Nunes and Appleton concede that this court in Murphy v. United Steelworkers of America, 507 A.2d 1342 (R.I. 1986), ruled that the prejudgment-interest statute, G.L. 1956 (1985 Reenactment) § 9-21-10, does not apply to punitive damages. However, Nunes and Appleton contend that neither this court nor the trial court addressed the issue of whether interest should accrue on a punitive-damage award during an appeal to this court.

In Greater Providence Deposit Corp. v. Jenison, 485 A.2d 1242, 1244 (R.I. 1984), we emphasized that punitive damages are awarded to punish the defendant rather than compensate the plaintiff. While there may be some merit in Nunes's and Appleton's contentions that failure to award such an interest in such circumstances benefits the wrongdoers, this complaint should be directed to the Legislature because the language in

§ 9-21-10 speaks of an award of interest on pecuniary awards but fails to mention punitive awards. In Murphy we believed that this omission was significant. Consequently, we cannot fault the trial justice's disposition of the damages awarded to Nunes and Appleton.

Accordingly DeLeo's appeal as it relates to the slander-of-title claim is denied and dismissed. Nunes's cross-appeal on the grant of a remittitur of a portion of the punitive-damage award is also denied. Nunes's and Appleton's cross-appeals on their claims for prejudgment interest are also dismissed. However, Nunes's and Appleton's claims for abuse of process and malicious use of process are sustained and the case is remanded to the Superior Court for further proceedings. Upon remand Nunes will be afforded a ten-day period within which he can comply with the remittitur

mandate. If there is no compliance, a new trial will be held limited to the issue of damages Nunes sustained because of DeLeo's slander of Nunes's title.

APPENDIX B - PETITION FOR REARGUMENT IN THE RHODE ISLAND SUPREME COURT

IN THE SUPREME COURT
OF THE STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

RAYMOND DeLEO, et al. Petitioner, v. ANTHONY A. NUNES, INC., et al. Respondents.	)	APPEAL NO. 86-516

PETITION FOR REARGUMENT
AND SUPPORTING MEMORANDUM

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INTRODUCTION

Appellant Raymond DeLeo ("DeLeo") petitions, pursuant to Supreme Court Rule 25, for reargument in the case of Raymond DeLeo, et al. v. Anthony A. Nunes, Inc., et al., No. 86-516-Appeal, decided by this Court on August 24, 1988.

STATEMENT OF THE CASE

On September 3, 1981, petitioner DeLeo filed a complaint in Superior Court for a declaratory judgment and injunctive relief respecting the application of the public trust doctrine to filled tide lands owned by respondent Anthony A. Nunes, Inc. ("Nunes"). Later he amended the complaint to include respondents Daniel and Sally Appleton ("Appleton") who owned similar property. Contemporaneously DeLeo filed notices of lis pendens against the Nunes and Appleton filled tideland property.

On October 22, 1982, Mr. Justice Almeida of the Superior Court ruled that the

lis pendens were null and void because, under his view of Rhode Island law, all public trust rights in the Nunes and Appleton tideland properties had been extinguished when the lands were filled in 1933.

Based on this ruling an order entered in December 1982 (per Mr. Justice Cochran) to dismiss the complaint. DeLeo attempted to appeal this dismissal, but that appeal was dismissed as premature in December, 1983 since the rights and liabilities of all the litigants had not yet been adjudicated.

Nunes and Appleton counterclaimed against DeLeo alleging slander of title, abuse of process and malicious use of process. A trial on the counterclaims was held in October, 1985. After directing verdicts in favor of DeLeo on the abuse of process and malicious use of process counts, the trial justice sent the case to the jury on the slander of title counterclaim. The jury

returned a verdict against DeLeo and judgment entered.

DeLeo appealed that judgment to this Court by filing a timely notice of appeal which specifically indicated that he was appealing the final judgment entered in the case. See Notice of Appeal, dated May 19, 1986. Subsequently he filed a pre-briefing statement with this Court specifically designating the issues he intended to raise on appeal. These issues included: "3. Whether Mr. Justice Almeida erred in vacating the lis pendens," and "4. Whether the trial judge erred in dismissing Plaintiff's Complaint." See, Appellant's Pre-Briefing Statement submitted on appeal to this Court. Respondents Nunes and Appleton were served with a copy of this statement.

DeLeo then submitted his brief on appeal to this Court. In that brief he specifically argued that the surviving

public trust interest in respondents' tideland property constituted a complete defense to respondents' counterclaims and that, at the very least, the jury verdict against DeLeo must be vacated because the jury was not instructed that respondents' lands were subject to the public trust doctrine. Had the jury been so instructed, DeLeo argued, it might well have determined that DeLeo's activities in attempting to vindicate the public trust were genuine and legitimate, and in no way motivated by or injected with malice.

In its decision dated August 24, 1988 this Court has (1) explicitly declined to address DeLeo's public trust defense, Opinion, p. 3, yet (2) implicitly determined the public trust issue in holding that DeLeo's lis pendens filings were lacking in any "colorable claim." Opinion, pp. 8, 9.

Petitioner DeLeo respectfully submits that these determinations are individually

erroneous, and collectively contradictory. Only a direct and unequivocal determination of the public trust issue by this Court can resolve this problem.

Because a determination by this Court that respondents' tidelands are protected under the public trust doctrine provides a complete defense to respondents' counterclaims for abuse of process and malicious use of process, and because such a determination would at the very least entitle DeLeo to a new trial on respondents' counterclaim for slander of title, DeLeo respectfully petitions this Court to address the merits of the public trust issue on reargument.

REASONS FOR GRANTING THE PETITION

This Court should address the public trust doctrine raised by DeLeo in defense against respondents' counterclaims for the

following reasons:[1]

1. Under Rhode Island law the filing of a timely notice of appeal on the final judgment in a case upon entry of said judgment preserves for appellate review all issues decided below.

2. DeLeo could not have been collaterally estopped from raising the public trust issue before this Court by Mr. Justice Almeida's ruling on the issue in the lis pendens proceeding below, because neither collateral estoppel nor any other valid legal doctrine can deprive a litigant from raising an issue of law on an appeal as of right in the very same case in which the

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1/ Should this Court grant reargument, petitioner requests the opportunity to fully brief the issues. As petitioner, under Rhode Island law, had only five days to prepare this petition after this Court handed down its decision, petitioner reserves the right to raise issues relevant to Mr. DeLeo's constitu- tional rights not specifically presented in this petition or its briefs currently on file with the Court, upon reargument before this Court or upon further review before the Supreme Court of the United States.

issue was decided against him at the trial level.

3. Supreme Court Rules 3 and 4, as applied to DeLeo in this case, are unconstitutional because they preclude him from raising the public trust doctrine as a defense, and thus deprive him of the due process of the law in violation of the Fourteenth Amendment of the Constitution of the United States.

4. Supreme Court Rules 3 and 4, as applied to DeLeo in this case, are unconstitutional because they preclude DeLeo from raising the public trust doctrine as a defense and thus violate DeLeo's rights to free speech under the First Amendment of the Constitution of the United States and also lead to a result which contradicts the common law of Rhode Island.

5. This Court's explicit determination pursuant to Supreme Court Rules 3 and 4, not to address the public

trust issue combined with its implicit holding that the public trust interest in respondents' lands was extinguished constitutes an unreasoned and contradictory opinion rendered without affording DeLeo a fair hearing, in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

6. This Court's reversal of the trial judge's direction of verdicts in favor of DeLeo on respondents' claims for abuse of process and malicious use of process, made without a determination that the public trust interest in respondents' lands was extinguished, is an unconstitutional application of Supreme Court Rules 3 and 4 in that it violates DeLeo's First and Fourteenth Amendment rights under the Constitution of the United States and leads to a result which contradicts the common law.

1. Under Rhode Island Law The Filing Of A Timely Notice Of Appeal Upon Entry Of Final Judgment Preserves For Review All Issues Decided Below

This Court has held that because DeLeo's "claim of appeal is specifically directed at the counterclaim phase of this dispute and what transpired when the counterclaims were considered in October 1985," DeLeo is barred from appealing Mr. Justice Almeida's determination (in connection with Mr. DeLeo's original complaint) that the public retained no interest in respondents' filled tidelands. The Court should reconsider this holding.

Under Supreme Court Rule 4 an appeal is taken by filing a notice of appeal with the clerk of the trial court within twenty days from the entry of final judgment. DeLeo did so. See, Notice of Appeal, filed May 19, 1986. Supreme Court Rule 4 goes on to state that "an appeal from a judgment preserves for review any claim of error in the record." (Emphasis supplied).

In his notice of appeal DeLeo clearly appealed from the final judgment in the case. In designating what action he was appealing from he marked off the box labeled "judgment/jury." (Emphasis supplied). It is true that he did not mark off the box labeled "Dismissal Merits." Nor was he required to do so. Under Rhode Island law a final judgment entered by a trial judge on a jury verdict incorporates within it and subsumes all previous interlocutory orders. See Pearson v. Old Stone Savings Bank, 119 R.I. 836, 383 A.2d 1029 (1978) (judgment not final until all rights and liabilities of parties have been decided); Westinghouse Broadcasting Co., Inc. v. Dial Media, Inc., 122 R.I. 571, 410 A.2d p. 986 (R.I. 1980). See also RCP 54(b), which states that when more than one claim for relief is presented in an action, whether as a claim or a counterclaim, the court may enter final judgment as to fewer than all of the claims

of the parties only upon an express determination that there is no just reason for delay and an express direction for the entry of judgment. This was never done in DeLeo's case. Neither the Superior Court, nor either party, sought to accelerate final judgment. Final judgment entered therefore, only at the conclusion of the jury trial on Nunes' counterclaim when all the rights and obligations of the parties had been established.

It cannot therefore be credibly alleged that DeLeo failed to conform to the requirement of Supreme Court Rule 3(c), which recites that the notice of appeal "shall designate the judgment, order or decree or part thereof appealed from." By appealing the final judgment of the trial court he reserved his rights to appeal <u>all</u> components of that single comprehensive judgment.

DeLeo, furthermore, had determined not to pursue his original claim against

respondents. This was his prerogative. Therefore, he did not specifically appeal Judge Cochran's interlocutory order of dismissal of his complaint. This tactical decision surely cannot preclude DeLeo from raising the public trust doctrine as a defense to the final judgment he has explicitly appealed -- the judgment on respondents' counterclaims.

Assuming arguendo that DeLeo made a technical error by not checking off all the appropriate boxes on the notice of appeal, still he should be allowed to raise the public trust doctrine as a defense to respondents' counterclaims. In Hormel v. Helvering Commissioner of Revenue, 312 U.S. 552, 557 (1941), the Supreme Court of the United States unambiguously declared that "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts

of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." (emphasis supplied.)

In particular, a "notice of appeal should be liberally construed and technical deficiencies should not defeat the appeal absent prejudice to the appellee." West's Rhode Island Practice, RCP 73(a), commentary §73.6 p. 517 (1969).[2]

In Foman v. Davis, 371 U.S. 178, 181 (1962), the Supreme Court of the United States, in a landmark opinion, specifically addressed the requirements of fundamental justice in the context, directly analogous

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2/ RCP 73(a) is the predecessor to Supreme Court Rule 4. The relevant language of the two rules is identical.

to the instant situation, of an arguably technically incomplete notice of appeal. In Foman, the petitioner filed a complaint alleging breach of an oral contract. The federal district court dismissed the claim as barred by the Statute of Frauds. The petitioner then filed a motion to vacate the judgment and to amend the complaint to add a count in quantum meruit. This motion was denied. On appeal, the parties briefed and argued the merits of all the issues decided below. Notwithstanding this procedural history, the Court of Appeals dismissed the appeal insofar as it addressed the breach of contract claim and reviewed only the trial judge's denial of plaintiff's motion to amend and to vacate the judgment. The Court of Appeals held that the notice of appeal was ineffective to review the breach of contract judgment "because the notice failed to specify that the appeal was being taken from that judgment as well as from the [sub-

sequent] orders denying the motions." 371 U.S. at 180, 181.

The Supreme Court of the United States reversed and remanded to the Circuit Court to consider all the issues raised by the petitioner on appeal. The Court held that the defect in the notice of appeal could not preclude plenary review since the defect did not mislead or prejudice the respondent. "Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal submitted to both respondent and the court pursuant to the rule similarly demonstrated the intent to challenged the dismissal." 371 U.S. at 181 (emphasis supplied).

The Supreme Court concluded:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The Federal Rules reject the approach that pleading is a game

> of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41. The Rules themselves provide that they are to be construed "to secure the just, speedy and inexpensive determination of every action." Rule 1.[3]

Respondents here, like those in Foman v. Davis, have in no way been prejudiced by any technical pleading error DeLeo may have made in filing his notice of appeal. Not only did DeLeo (and the respondents as well) exhaustively brief the public trust issue in the brief he submitted to this Court, but in his pre-briefing statement served on the Court and respondents he specifically enumerated among the issues presented: "3. Whether Mr. Justice Almeida erred in

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3/ The decision in Foman v. Davis, although specifically addressed to the Federal Rules of Civil Procedure, has undeniable applicability to the virtually identical provisions of the Rhode Island Rules. See West's Rhode Island Practice, RCP 73(a), commentary §73.6, p. 517 (1969) (specifically embracing the rule embraced in Foman v. Davis).

vacating the lis pendens"; and "4. Whether the trial court erred in dismissing Plaintiff's Complaint." See Appellant's Pre-Briefing Statement submitted on appeal to this Court.

Given the unequivocal language of Supreme Court Rule 4, DeLeo's timely filing of a notice of appeal on the final judgment, and the Supreme Court's holding in Foman v. Davis, DeLeo respectfully petitions this Court to reconsider its decision precluding DeLeo from raising the public trust issue as a defense to respondents' slander of title counterclaims on an appeal as of right before this Court.[4]

4/ See Article 10, Section 2 of the Rhode Island Constitution: "The Supreme Court shall have final revision and appellate jurisdiction upon all questions of law and equity;" D'Arezzo v. D'Arezzo, 107 R.I. 422, 267 A.2d 683, 685 (R.I. 1970) ("Under our Constitution it is the prerogative of this Court to determine the law").

2. Mr. Justice Almeida's Decision That the Public Had No Interest In Respondents' Tideland Property Cannot Have Collaterally Estopped DeLeo From Raising The Issue Before This Court.

The Court has held that the dismissal of DeLeo's original claims, based on Mr. Justice Almeida's determination that the public interest in the respondents' filled tidelands was extinguished, "estops DeLeo from attempting to invoke the so-called public trust doctrine as a defense to the slander-of-title counterclaims filed by Nunes and Appleton." Opinion p. 3. The Court cites Cole v. Charron, 477 A.2d 959, 961 (R.I. 1984) in support of this determination.

Petitioner DeLeo respectfully submits that the doctrine of collateral estoppel as articulated in Cole v. Charron has no application to this case. Cole v. Charron holds "that collateral estoppel makes conclusive in a subsequent action on a different claim the determination of particular issues

actually litigated in a prior action as long as the issues are identical, the prior judgment was final[5] and the individual who is the subject of the estoppel was a party or in privity with a party in the prior action." 477 A.2d 961. (Emphasis supplied.) Collateral estoppel, then, can only apply where an issue decided in one

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5/ Neither Mr. Justice Almeida's order vacating the lis pendens nor Mr. Justice Cochran's order of dismissal consti- tuted a final judgment. Under Rhode Island law a judgment in a lawsuit is not final until "all the rights and liabilities of the parties have been adjudicated." Pearson v. Old Stone Savings Bank, 119 R.I. 836, 383 A.2d 1029 (1978); Westinghouse Broadcasting Co. Inc. v. Dial Media, Inc., 122 R.I. 571, 410 A.2d 986 (R.I. 1980). When DeLeo's claims were dismissed the case had yet to go to trial on respondents' counterclaims. See also RCP 54(b) which states that when more than one claim for a relief is presented in an action, whether as a claim or a counterclaim, the court may enter final judgment as to fewer than all of the claims of the parties only upon an express determin- ation that there is no just reason for delay and an express direction for the entry of judgment. This was never done in DeLeo's case. Neither the Superior Court, nor either party, sought to accelerate final judgment. Final judgment entered, therefore, only at the conclusion of the jury trial on Nunes' counterclaim when all the rights and obligations of the parties had been established.

lawsuit is raised in a subsequent lawsuit. Counsel for petitioner DeLeo knows of no case in any American jurisdiction which holds that the doctrine of collateral estoppel applies to determinations of law made at the trial court level which are then appealed to a higher court in the same case.

Nor can the doctrine of law of the case preclude DeLeo from arguing the public trust doctrine on appeal before this Court. The law of the case doctrine makes binding upon a court only "a ruling made by a court at the same or higher level during prior stages of the same litigation." Lacy v. Gardino, 791 F.2d 980, 984 (1st Cir. 1986), cert. denied, 107 S. Ct. 284 (1986). To hold that a decision of law made by a lower court is binding on a higher court on appeal is to disavow the fundamental concept of judicial review firmly established in this country since the landmark decision of the Supreme Court of the United States in Marbury v.

Madison, 1 Cranch 137 (1803). "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." St. Joseph Stock Yards Co. v. U. S., 298 U.S. 38, 84 (1936) (concurring opinion of Brandeis, J.); Ortwein v. Schwab, 410 U.S. 656, 665, 666 (1973) (concurrence of Marshall, J.). And as this Court has explicitly stated, "Under our Constitution it is the prerogative of this Court to determine the law." D'Arrezo v. D'Arrezo, 267 A.2d 683, 685 (R.I. 1970).

3. Supreme Court Rules 3 and 4, As Applied To DeLeo In This Case, Are Unconstitutional Because They Preclude Him From Raising The Public Trust Doctrine As a Defense, and Thus Deprive Him of The Due Process of The Law in Violation of The Fourteenth Amendment of the Constitution of the United States.

While a State need not provide a system of appellate review as of right at all, if it does so, such a system must accord with due process. "The right to appeal would be

unique among state actions if it could be withdrawn without consideration of applicable due process norms." Evitts v. Lucey, 469 U.S. 387, 401 (1985).

Accordingly, in Thomas v. Arn, 474 U.S. 140 (1985), the Supreme Court of the United States scrutinized a procedural rule adopted by the Sixth Circuit Court of Appeals which conditioned appeal when taken from a district court judgment adopting a magistrate's report upon the filing of objections with the district court identifying the issues on which further review was desired.

The Court commenced its analysis by stating that appellate courts have the power "to mandate procedures deemed desirable from the viewpoint of sound judicial practice." 474 U.S. at 146. It went on to state that, "Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions." Id. at 148. The Court then

held that the constitutionality of such a rule is dependent upon "clear notice to the litigants." Id. at 155. The Court, over the objection of three dissenting justices, upheld the Sixth Circuit rule because (1) the requirement that objections to the magistrate's report be filed with the district court serves judicial economy in that it affords the district court an opportunity to correct errors before wasting scarce appellate court resources, id. at 147, 148; (2) the rule was not applied to the first litigant who challenged its validity before the Sixth Circuit but was given only prospective effect, "since rules of procedure should promote, not defeat the ends of justice," id. at 145 referring to U. S. v. Walters, 638 F.2d 947, 949, 950 (6th Cir. 1981); and (3) all litigants were clearly notified in advance of the rule and that failure to comply would result in a waiver of the right to appeal. Id. at 144.

This Court's application to DeLeo of Supreme Court Rules 3 and 4[6] has created a novel rule, to the effect that the timely filing of a notice of appeal of a final judgment entered on a jury verdict is not sufficient to preserve for review an issue of law which provides a complete or partial defense to the judgment merely because the appellant did not pursue the issue offensively by explicitly appealing a judgment on an interlocutory motion dismissing his complaint. That rule meets none of the criteria set forth by the United States Supreme Court. The rule is enunciated in a single terse sentence unsupported by case law from any jurisdiction. It runs contrary to the plain language of Supreme Court Rule 4, which provides that "an appeal from a judgment preserves for review any

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6/ Supreme Court Rules 3 and 4 have the same force and effect as a statute. Letendre v. Rhode Island Hospt. Co., 74 R.I. 276, 60 A.2d 471 (1948); General Laws of Rhode Island, Section 8-6-2 (1985).

claim of error in the record." And it is in blatant contradiction to the holding of the Supreme Court of the United States in Foman v. Davis that technical errors in a notice of appeal should not be used to preclude a litigant from arguing the merits of his appeal.

Nonetheless, the Court springs this rule upon DeLeo retrospectively and with no trace of notice. Such a retrospective application of a published rule which radically departs from the clear language of that rule and settled precedent in the Supreme Court of the United States cannot possibly comport with due process when it is employed to deprive a litigant on appeal of the opportunity to present a sound defense to the judgment he is appealing. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 314 (1950) (fundamental requirement of due process in any proceeding which is to be accorded finality is notice,

reasonably calculated under all the circumstances to afford interested parties an opportunity to present their objections); Goldberg v. Kelly, 397 U.S. 254, 267, 268 (1970) (notice must be sufficient to enable party to determine what is being proposed and what must be done to prevent the deprivation of his interest).

Moreover, the obscure rule announced by the Court in this case and applied retrospectively to DeLeo will not benefit or improve judicial economy. The checking of boxes on a notice of appeal form will not streamline this Court's work. The Court is apprised of the issues raised on appeal not by this pro forma filing but by the preliminary briefing statements filed with this Court by the parties and their briefs.

4. Supreme Court Rules 3 and 4, As Applied To DeLeo in This Case, Are Unconstitutional Because They Preclude DeLeo From Raising the Public Trust Doctrine as a Defense and Thus Violate DeLeo's Rights to Free Speech Under the First Amendment of the Constitution of the United States and Also Lead To A Result Which Contradicts the Common Law of Rhode Island.

If DeLeo's statements in vindication of the public trust are true or if DeLeo honestly believed them to be true due to the unsettled nature of the public trust doctrine in this State, his statements are squarely protected under the First Amendment. Since DeLeo's statements concern an important issue of public or general concern, he cannot be found liable under state law for his statements unless he reasonably should have known their falsity. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), cert. denied, 459 U.S. 1226 (1983).

In this case where DeLeo is attempting to vindicate a public interest expressly

recognized by the Rhode Island Constitution[7] and the Supreme Court of the United States,[8] his statements concerning the public trust interest in respondents' land, if true or made in a good faith belief that they were true, must be given vigorous First Amendment protection. In such a context "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." Linn v. United Plant Guard Workers of America, 383 U.S. 53, 63 (1966); See also New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("That freedom of expression upon public questions is secured by the First Amendment has long

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7/ Article I, Section 17 of the Rhode Island Constitution guarantees that, "The people shall continue to enjoy and freely exercise all rights of fishery and the privileges of the shore."

8/ The public trust doctrine is explicitly championed under federal law in Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 453 (1892) and Appleby v. City of New York, 271 U.S. 364, 383 (1926); Phillips Petroleum Co. v. Mississippi 56 U.S.L.W. 4143 (U.S. Feb. 23, 1988).

been settled by our opinions.") If the judgment against DeLeo on the slander of title counterclaim is allowed to stand, based on this Court's application of Supreme Court Rules 3 and 4, without an express determination that the public trust doctrine was extinguished in Rhode Island and that DeLeo should have known this, his constitutional right to speak out in behalf of the public interest will have been not merely chilled but violated.

The jury verdict against DeLeo, absent a prior legal determination of the public trust issue, cannot stand for another reason as well. If it is the case the purely private utilization of that respondents' filled tide lands are subject to the public trust, then it was imperative that the jury have been so informed. Given this knowledge the jury might well have found that DeLeo's statements, even if not made in express vindication of the public trust, take on a

new and justifiable light in view of the valid public purpose DeLeo was attempting to vindicate.[9]

Without a determination by this Court, therefore, not only that the public trust was extinguished in respondents' lands, but also that DeLeo should reasonably have known so given the existing state of the law, the jury verdict against him cannot stand. The jury's findings of malice, reached in ignorance of the nature and scope of the public trust doctrine as it applies to shore and tidelands, may well have been based on an erroneous conclusion that DeLeo was spouting deliberate or negligent falsehoods in championing the public trust interest in

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9/ It should be noted that insofar as DeLeo's statements con- sist of opinion, not fact, they are squarely protected under the First Amendment. See Gertz v. Robert Welch, Inc., 418 U.S. at 339 ("We begin with common ground. Under the First Amendment there is no such thing as a false opinion. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competi- tion of other ideas.")

respondents' lands. To hold DeLeo liable against this background is both unfair and constitutionally impermissible, to say nothing of assessing punitive damages against him on this defective basis. See Gertz, 418 U.S. 349 (proof of actual malice -- e.g., knowledge of falsity or reckless disregard for truth -- required to assess punitive damages.)

Moreover, slander of title under Rhode Island law requires, "an intent to deceive or injure and in order to constitute it there must be a false statement, [and] it must be made with full knowledge of its falsity[.]" Hopkins v. Drowne, 21 R.I. 20, 41 A. 567 (1898). If DeLeo's statements in vindication of the public trust are true or if DeLeo honestly believed them to be true due to the unsettled nature of the public trust doctrine, then under the law of Rhode Island he has not acted with malice and consequently has not committed slander of

title. He must be given an opportunity to establish this if his constitutional rights of procedural due process and free expression are to have any meaning.

5. This Court's Explicit Determination Not To Address The Public Trust Issue, Pursuant to Supreme Court Rules 3 and 4, Combined With Its Implicit Resolution Of That Issue Against DeLeo Violates DeLeo's Due Process Rights.

On page 3 of its opinion this Court, applying Supreme Court Rules 3 and 4, unequivocably declined to address the public trust issue. On pages 8 and 9, however, the Court held that DeLeo filed lis pendens on respondents' lands "without a colorable claim." On this basis the Court determined that the trial court erred in directing verdicts in DeLeo's favor on respondents' abuse of process and malicious use of process counterclaims and it remanded to the trial court for a new trial.

The Court, however, could not have determined that DeLeo's lis pendens filings

were "without a colorable claim" unless it also implicitly determined that the public trust interest in respondents' lands was extinguished.

Mr. Justice Almeida vacated DeLeo's lis pendens filings as to the respondents' filled tidelands specifically because, under his reading of this Court's early rulings, the public trust interest in those tidelands had been extinguished.[10] This was his unique ground of decision for vacating the lis pendens filings on these lands. It follows, therefore, that if the public interest

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10/ Mr. Justice Almeida's conclusion was particularly inappro- priate with respect to the property at issue, since the license of the respondents' predecessor in title who had filled the tidelands had explicitly provided that "this instrument does not give any property rights either in real estate...or any exclusive privilege..." Defendant's Exhibit DD in the record on appeal. This fact alone should have been sufficient to lend color to Mr. DeLeo's claims, since it itself cast doubt on Nunes' title to the tidelands, and "Doubtful titles have been denied protection [in actions for slander of title, or injurious falsehood]." Prosser & Keaton on Torts, ch. 24, §128, p. 965, n. 37 (5th Edition, 1984).

in the lands were valid, the lis pendens filings would have been legitimate.

This Court, in following and refusing to review Mr. Justice Almeida's decision, has effectively held that the public interest in respondents' lands was extinguished. At the same time it has effectively denied DeLeo the opportunity to address and to receive an explicit resolution of the issue under Supreme Court Rules 3 and 4. Such a procedure violates the elementary and fundamental due process requirement of a fair hearing to give an opportunity for a party to present his objections in any state proceeding which is to be accorded finality. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); See also Jenkins v. McKeithen, 395 U.S. 411, 429 (1969) (the right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause).

Moreover, a litigant is entitled under the due process clause to a reasoned opinion on the legal rules and evidence considered by the tribunal adjudicating his claim. Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1937).

An opinion which is patently contradictory, and which makes a ruling on an issue of law at the same time it explicitly refuses to address that issue by a reasoned explanation of the law cannot satisfy this requirement.

6. This Court's Reversal of the Trial Judge's Direction of Verdicts in Favor of DeLeo on Respondents' Claims for Abuse of Process and Malicious Use of Process, Made Without a Determination That the Public Trust Interest in Respondents' Lands Was Extinguished, Is An Unconstitutional Application of Supreme Court Rules 3 and 4 in That It Violates DeLeo's First and Fourteenth Amendment Rights Under the Constitution of the United States and Leads To A Result Which Contradicts the Common Law.

Without a specific finding that the

public had no interest in respondents' land and that DeLeo should reasonably have known this, this Court's holding that there was evidence from which the jury could have found the malice requisite for malicious use of process is constitutionally infirm. This Court, applying Supreme Court Rules 3 and 4, has declined to make such a finding.

Under the doctrine of New York Times v. Sullivan, 376 U.S. 254 (1964), and its progeny there can be no actionable malice under state tort law sufficient to trump an individual's First Amendment right to speak in behalf of the public interest, where the speech in question is true or made with a good faith belief that it is true. See Section 4, supra. This is so a fortiori where the scrutinized speech is the recording of a lis pendens, since "the publication of pleadings is unquestionably clothed with absolute privilege, and we have concluded that the republication thereof by recording

a notice of lis pendens is similarly privileged." Albertson v. Raboff, 295 P.2d 405, 409 (Cal. 1956). Such a privilege is necessary to protect the preeminent value of free access to the courts. Wendy's of South Jersey, Inc. v. Blanchard Management Corp., 406 A.2d 1337, 1338 (N.J. Sup. Ct. 1979).

It is well settled, moreover, that one who files a lis pendens or similar lien notice with reasonable grounds to believe that he has a legal or equitable claim to an interest in property has not acted with malice. Rogers Carl Corp. v. Moran, 246 A.2d 750, 103 N.J. Sup. 163 (1968); Midwest Glass Co. v. Stanford Development Co., 34 Ill. App.3d 130, 135-136, 339 N.E. 2d 274, 278 (1975); Bothmann v. Harrington, 458 So.2d 1163 (Fl. App. D3, 1984). Indeed, the general rule in this country is that the good faith filing of a lis pendens is absolutely privileged. Zamarello v. Yale, 514, P.2d 228 (Ala. 1973); Houska v. Frederick,

447 S.W.2d 514 (Mo. 1969); Albertson v. Raboff, 295 P.2d 405 (Cal. 1956). The filing of a lis pendens is wrong and indicative of malice only where one filing the notice has, as this Court points out, "no colorable claim." See, e.g., Fountain v. Mojo, 687 P.2d 496, 500 (Colo. App. 1984).

Unless, however, this Court holds that the public interest in respondents' lands was extinguished and DeLeo should reasonably have known this, he is not liable for malicious use of process.

Nor can this Court lawfully remand to the trial judge on the issue of abuse of process absent a clear holding that the public doctrine is inapplicable to respondents' lands. This Court has previously held that, "The action of abuse of process provides a remedy for a claim arising when a legal procedure, although set in motion in proper form, has been perverted to accomplish an ulterior or wrongful purpose for which it

was not designed." Nagy v. McBurny, 120 R.I. 925, 392 A.2d 365, 370 (R.I. 1978) (emphasis supplied). Nagy v. McBurney cannot, however, under the Constitution of the United States, stand for the further proposition that a person who has a valid legal claim may be held liable on a count of abuse of process for pursuing it. Such an outcome would intolerably chill speech directed toward a preeminent public purpose, vindication of legal rights and particularly of rights possessed by the public at large. Unless, then, this Court explicitly determines that the public trust doctrine was extinguished as to respondents' property, and that DeLeo should reasonably have known so, DeLeo cannot be liable for abuse of process under the First Amendment, as his lis pendens filings would have been legitimate and made in good faith. See Section 4, supra. The Court has, to date, refused to

make such a ruling, relying on Supreme Court Rules 3 and 4.

This Court explicitly acknowledges that malice is an element of the tort of abuse of process at page 7 of its opinion in stating that DeLeo's lis pendens filings were "part of a comprehensive malicious effort." (Emphasis supplied). But actionable malice, sufficient to trump a litigant's free speech interest, must be founded in deliberate or negligent falsehood. To the extent that DeLeo's public trust claim is true, his action in filing the lis pendens is valid and protected under the First Amendment.

Nor could a rule which would allow an action for abuse of process where the litigant's claim is legitimate withstand scrutiny under the due process clause of the Fourteenth Amendment, because it would impermissibly chill an individual's fundamental right of access to the courts. In Bankers Life & Casualty Company v. Crenshaw,

56 U.S.C.W. 4418 (1988), an appellant argued to the Supreme Court of the United States that a Mississippi law which imposes a damage award calculated at 15% of the underlying judgment on an appellant who unsuccessfully appeals a money judgment or possessory action chills his access to the courts under the Fourteenth Amendment.

The Court refused to reach the issue because it had not been properly preserved below. In concurrence, Justice O'Connor, joined by Justice Scalia, noted, however, that the due process issue was one which the Court should consider in an appropriate case.

The chilling effect of requiring unsuccessful appellants to pay a fine pales in comparison with a state law abuse of process action which would subject a litigant who asserted a legitimate defense to a tort action merely by attempting to have his cause heard in court. See Johnson v. Avery, 393 U.S. 483, 448 N.24 (1969) (concurring

opinion of Douglas J.) (reasonable access to the courts is a right secured by the Constitution and laws of the United States, being guaranteed as against state action by the due process clause of the Fourteenth Amendment).

CONCLUSION

For the foregoing reasons Mr. DeLeo respectfully petitions this Court for reargument to determine whether the public trust interest in respondents' filled - tidelands, which were the subject of the proceedings below, has been validly extinguished.

RAYMOND DELEO

By his attorneys,

Gerard McG. DeCelles
355 Thayer Street
Providence, RI 02906
(401) 421-7707

Kenneth Laurence
Michael Halley
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, MA 02109
(617) 227-5020

Dated: August 29, 1988

APPENDIX C - ORDER OF THE RHODE ISLAND SUPREME COURT DENYING PETITION FOR REARGUMENT

Supreme Court

No. 86-516-A.

Raymond DeLeo and Anna DeLeo :

v. :

Anthony A. Nunes, Inc. et al. :

O R D E R

The petition to reargue is denied.

Entered as an Order of this Court this 21st day of September 1988.

By Order,

Matthew J. Smith
Clerk

APPENDIX D - NOTICE OF APPEAL
TO THE SUPREME COURT OF
THE UNITED STATES

SUPREME COURT
RECEIVED
MATTHEW J. SMITH, CLERK
1988 SEP 23 PM 3:08

RAYMOND DeLEO AND ANNA DeLEO, Appellants, v. ANTHONY A. NUNES, INC., AND SALLY APPLETON, Appellees.	APPEAL NO. 86-516

NOTICE OF APPEAL TO THE SUPREME COURT OF
THE UNITED STATES

Notice is hereby given that Raymond DeLeo and Anna DeLeo, the appellants named above, appeal pursuant to 28 U.S.C. §1257(2) to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Rhode Island and Providence

Plantations ("Rhode Island Supreme Court") first entered on August 24, 1988, and reaffirmed on September 21, 1988, when the Rhode Island Supreme Court denied appellants' petition for reargument. Appellants appeal those portions of the final judgment of the Rhode Island Supreme Court which affirm the trial court's judgment against appellants for slander of title and reverse the trial court's direction of verdicts in favor of appellants on appellees' claims for abuse of process and malicious use of process.

Since the appeal draws into question the constitutionality, as applied to appellants, of Rhode Island Supreme Court Rules 3 and 4, promulgated by the Rhode Island Supreme Court and having the same force and effect as statute, and neither the State of Rhode Island nor any agency, officer, or employee of the State of Rhode

Island is a party, it is noted that 28 U.S.C. §2403(b) may be applicable.

RAYMOND DeLEO AND
ANNA DeLEO

By their attorneys,

Gerard McG. DeCelles
355 Thayer Street
Providence, RI 02906
(401) 421-7707

Kenneth Laurence
Donald L. Connors
Michael Halley
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, MA 02109
(617) 227-5020

Dated: September 23, 1988

AFFIDAVIT OF SERVICE

I, Gerard McG. DeCelles, attorney of record for Raymond DeLeo and Anna DeLeo, appellants herein, depose and say that on the twenty-third day of September, 1988, I served this Notice of Appeal on Anthony A. Nunes, Inc., and Sally Appleton, appellees herein, by mailing, first class postage

prepaid, three copies to William R. Grimm in the offices of Hinckley, Allen, Snyder & Comen, counsel of record for Anthony A. Nunes, Inc., located at 1500 Fleet Center, Providence, RI 02903, and three copies to Sean O. Coffey in the offices of Licht & Semonoff, counsel of record for Sally Appleton, located at 1 Park Row, Providence, RI 02903. I further depose and say that I served this Notice of Appeal by mailing, first class postage prepaid, three copies to James E. O'Neil, the Attorney General of Rhode Island, located at 72 Pine Street, Providence, RI 02903.

All parties required to be served have been served.

Gerard McG. DeCelles

APPENDIX E - DECISION AND ORDER OF THE RHODE ISLAND SUPERIOR COURT VACATING LIS PENDENS

STATE OF RHODE ISLAND

PROVIDENCE, SC. SUPERIOR COURT

RAYMOND DeLEO and ANNA A. DeLEO,

Plaintiffs,

v.

C.A. NO. 81-3187

ANTHONY A NUNES, INC., ALIAS, WALKERS COVE ASSOCIATION, INC., DANIEL APPLETON, ALIAS AND SALLY B. APPLETON, ALIAS,

Defendants.

D E C I S I O N

ALMEIDA, J. This matter is before the Court upon defendants' motion to vacate and declare null and void the lis pendens filed by plaintiffs upon defendants' property. Said lis pendens are recorded at Book 237, 232 and at Book 239, Page 405 in the

Registry of Deeds for the Town of Bristol, State of Rhode Island.

The Court will refer to the land in question as Parcels 1, 2, 3 and the thatched parcel as illustrated in defendants' exhibit A attached hereto and agreed upon by the parties as accurately reflecting the properties in issue.

A brief history of the devolution of the land is necessary. In 1933 Herreschoff Manufacturing Company (Herreschoff) owned Parcel 1 and the thatched parcel now owned by the DeLeos.

In 1933, Herreschoff applied to and received permission from the State of Rhode Island and the federal government to extend the seawall and to fill in behind the newly established seawall. Such permission was, in essence, a grant by the state and federal governments to extend the harborline. The

plaintiffs agree by admission that the character of any claim to the filled land depends upon the grant of permission to Herreschoff from the state and federal govenments.

The case of Engs v. Peckham, 11 R.I. 210 (1875) defines some of the rights which flow from the state's grant of an extension of the harborline. Engs states:

> ". . . If the respondents have license or invitation of the state to fill the wharf out, it will be no nuisance and no unlawful intrusion . . . for them to accept the license or invitation to fill the dock. Engs v. Peckham, 11 R.I. 210. 225 (1875).

The extension of the harborline in Engs is analogous to the federal and state grant of permission to Herreschoff to fill in the area now designated as parcels two and three. The permission granted in 1933 to fill the Walker's Creek area was tantamount to an extension of the harborline.

Additionally, the filling in by Herreschoff in 1933 conveyed all within the line to Herreschoff as its private property. The case of Engs v. Peckham, supra, clearly indicates this. The court in Engs states:

> "We think it would be going too far to hold that the mere establishment of a harbor line conveys all within the line absolutely to riparian proprietors. This would make all within the line private property, and extinguish the public rights.. . . We think the establishment of a harbor line, if it is to be construed as a conveyance, is subject to those rights until they are excluded from filling or wharfing out. Engs. v. Peckham, 11 R.I. 210 at 224. (Emphasis added.)

There was more than a mere establishment of a harborline here. The act of filling in the extended harborline by Herreschoff, pursuant to authorization by the state and federal governments, extinguished the public's rights to that area so filled. Engs v. Peckham, supra.

The holding was reaffirmed in Allen v. Allen wherein the court stated:

> The establishment of a harborline permits the riparian owner to carry the upland or highwater mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland and while the rights to shore and upland are not changed, they are carried further out into the tidal stream or sea. Allen v. Allen, 19 R.I. 116, citing, Engs v. Peckham, 11 R.I. 210, 224 (1875); Providence Steam Engine Company v. Providence and Stonington Steamboat Company, 12 R.I. 348, 355.

In harmony with the above cited cases, it is clearly established that once the land was filled to the extended harborline it became the private property of Herreschoff and any public rights began at the newly established high water mark. Accordingly, when Herreschoff conveyed the thatched parcel to Charles B. Rockwell, Jr., it retained full ownership of Parcels 1, 2, 3 and subsequently conveyed Parcels 1, 2, 3 to

the defendants' predecessor in interest. These transactions are clearly evidenced in the plat referred to in the deed from Herreschoff to Charles B. Rockwell, Jr. (see defendant's exhibit B(6)).

It is clear from the deed and plat plan that the plaintiffs predecessor in interest was deeded only the thatched parcel and Herreschoff retained full ownership of Parcel Three. Subsequently, Parcels 1, 2 and 3 were sold by Herreschoff to the defendants' predecessor in interest. Since, after filling in to the new harborline, Herreschoff owned absolutely all of these parcels, Engs, supra, it was free to divide and sell them as Parcels 1, 2, 3 and the thatched parcel. All public rights to Parcels 2 and 3 were extinguished upon Herreschoff's filling in to the newly

extended borderline. Engs v. Peckham, 11 R.I. 210 (1875).

In light of the above history of the property and the clear mandate of the case law, this Court grants defendants' motion to declare the lis pendens null and void as to Parcels Two and Three.

As to Parcel One, the plaintiffs claim no title or ownership to this parcel and for that reason the lis pendens as to that property must be declared null and void. Kent Estates, Inv. v. Matteson, 97 R.I. 230, 197 A.2d 292 (1964). If there is no litigation pending as to the property in question the lis pendens must be declared null and void. Kent Estates, Inc., supra.

Defendants' motion to declare the two lis pendens null and void is granted.

RAYMOND DeLEO and ANNA A DeLEO :

:

v. C.A. No. 81-3187 :

ANTHONY NUNES, INC., et al. :

ORDER

This matter came on to be heard before Mr. Justice Almeida on the defendants' motion to declare lis pendens null and void. The parties submitted the matter to the Court on an agreed statement of facts and memoranda of law. After consideration thereof and in light of this Court's decision dated October 20, 1982 which is hereby incorporated by reference, it is hereby

ORDERED, ADJUDGED and DECREED:

1. That the defendants' motion is granted.

2. That the lis pendens dated September 16, 1981 and April 19, 1982 previously filed by plaintiffs against defendants' property and recorded at Book 237 at Pages 232-235 and at Book 239 at Pages 405-407 in the Registry of Deeds for the Town of Bristol; State of Rhode Island are null and void and without legal effect.

3. Both of the aforesaid lis pendens are hereby vacated.

ENTERED as an order of this Court this 22nd day of October, 1982

ENTER: Almeida, J.

ORDER: Michael K. Kelleher, Asst. Clerk

I hereby certify that I mailed a copy of the within Order to the above-named counsel on this 22nd day of October, 1982.

A True Copy Attest:

Office of Clerk of Superior Court
Counties of Providence & Bristol
Providence, Rhode Island

APPENDIX F - ORDER OF THE RHODE ISLAND SUPERIOR COURT DISMISSING COMPLAINT

STATE OF RHODE ISLAND
PROVIDENCE, SC.
BRISTOL, SC.

SUPERIOR COURT

RAYMOND DeLEO and
ANNA A. DeLeo

v.

C.A. No. 81-3187

ANTHONY A. NUNES, INC
et al.

ORDER

This matter was heard on December 7, 1982 before Mr. Justice Cochran on the defendants' motion to dismiss plaintiffs' amended complaint on the ground that all of the claims raised by plaintiffs in said complaint have been adjudicated previously by this Court in favor of the defendants. After hearing thereon and consideration thereof it is hereby

ORDERED, ADJUDGED and DECREED:

1. That the defendants' motion is granted.

2. That plaintiffs' amended complaint against the defendants, Anthony A. Nunes, Inc., Walkers Cove Association, Inc., Daniel Appleton and Sally B. Appleton, is hereby denied and dismissed with prejudice.

ENTERED as an Order of this Court this 8th day of December, 1982.

ENTER: Cochran, J
8 Dec. 82

ORDER: Ernest DiBello
Asst. Clerk

APPENDIX G - ORDER OF THE RHODE ISLAND SUPERIOR COURT DISMISSING APPEAL AS PREMATURE

STATE OF RHODE ISLAND
BRISTOL, SC.
PROVIDENCE, SC.

SUPERIOR COURT

RAYMOND DeLEO and ANNA A. DeLEO	:	
v.	:	C.A. No. 81-3187
ANTHONY A. NUNES, INC. Inc. Alias WALKERS COVE ASSOC., Inc., DANIEL APPLETON, Alias and SALLY B. APPLETON, Alias	:	

ORDER

This matter was heard on January 6, 1983 before Mr. Justice Cochran pursuant to Rules of Appellate Procedure 11(f) on the defendants', Anthony A. Nunes, Inc., Walkers Cover Association, Inc., Daniel Appelton and Sally B. Appelton, motion to dismiss the plaintiffs' appeal to the Supreme Court on the grounds that said

appeal is premature in that the order appealed from dated December 7, 1982 is not a final judgment for purposes of appeal since not all of the rights and liabilities of the parties have been adjudicated. After hearing thereon and consideration thereof it is hereby

ORDERED, ADJUDGED and DECREED:

1. The defendants' motion is granted.

2. Plaintiffs' appeal to the Supreme Court from the Order of this Court dated December 7, 1982 is dismissed without prejudice.

ENTERED as an Order of this Court this day of January, 1983.

ENTER: Cochran, J. ORDER: _____

APPENDIX H - NOTICE OF APPEAL TO THE RHODE ISLAND SUPREME COURT

AUG 26 '88 15:38 RAYMOND CONSTRUCTION P.2

STATE OF RHODE ISLAND
SUPREME COURT **NOTICE OF APPEAL***

Case Title in Full
Plaintiff: RAYMOND DELEO, et al

Defendant: ANTHONY A.NUNES, INC. et al

Trial Court Case # 81-3187

Attorney for Plaintiff:
Gerard McG. DeCelles
220 South Main Street
Providence, RI 02903

Attorney for Defendant:
William F. Grimm
Hinckley & Allen
2200 Fleet National Bank Building
Providence, RI 02903

Date Case First Filed In Lower Court/Agency: September 16, 1981

Date Judgment/Order Appealed From: May 2, 1986

Date Appeal Filed: May 19, 1986

Party Filing Appeal:

[x] Plaintiff [ ] Petitioner
[ ] Defendant [ ] Respondent

Trial Court Judge: Gallant

Trial Court Action Appealed:

[ ] IPR Preliminary Injunction
[ ] CON Conviction
[ ] IPT Permanent Injunction
[ ] CJD Default Judgment
[ ] CDS Dismissal/Jurisdiction
[ ] CDM Dismissal Merits
[x] CTD New Trial Motion Denied
[ ] CTG New Trial Motion Granted
[ ] CJJ Judgment/Judge
[ ] CDV Directed Verdict
[X] CJU Judgment/Jury
[ ] DAL Alimony
[ ] PRO Probation Viol.
[ ] PTM Pre Trial Motion
[ ] FCJ Juvenile
[ ] PCR Grant Post Conviction
[ ] FCJ Juvenile
[ ] PCR Grant Post Conviction
[ ] DPC Denial Post Conviction
[ ] MTR Denial Sent. Reduction
[ ] DCF Dependency/Termination
[ ] FCC Federal Court C.Q.
[ ] DSJ Summary Judgment
[ ] WPB Petition for Benefits
[ ] ASF Agreed Statement of Facts
[ ] WPM Petition to Modify W.C.C.
[ ] DRP Original Divorce Petition
[ ] DBR Decision Bd. Regents
[ ] CUS Custody

Stage of Proceedings:

[ ] Pre Trial
[ ] During Trial
[x] Post Trial

Civil Damages: as to Counterclaim

Amount Sought _____

[ ] Denied [x] Granted

Judgment for:

[ ] Plaintiff
[x] Defendants/Counterclaimant
[ ] Other

Sentences:	**Trial Type:**
[ ] Confinement	[ ] Judge
[ ] Special Program	[ ] Jury
[ ] Post Trial	[ ] Appeal from Post-Conviction Relief
[ ] Suspended	
[ ] Probation	
[ ] Deferred	

Bail/Release Status:

[ ] Personal Recognizance
[ ] Held Without Bail
[ ] Surety Bond
[ ] Other
[ ] Cash Bond
[ ] Held in Lieu of Bail

Transcript Status:

Transcript Will Not Be Ordered: [ ]
Transcript Will Be Ordered**: [x]
Estimated Cost $ 3000.00
Filing Fee Required: x Yes ___ No
Appeal Filing Fee: $100.00
Trial Court Receipt #: _____
Court Reporter: Michael Soccoccia

May 19, 1986 — Date
Gerard McG. DeCelles — Filing Attorney(print)

#1394 — Registration #
_____ — Signature

** Pursuant to Rule 10 of the Rules of the Supreme Court, the appellant shall within 10 days "Order from the court reporter a

transcript of such parts of the proceeding not already on file as he deems necessary for inclusion in the record."

* Original to trial court: Copies to opposing attorney(s) and Supreme Court Clerk

APPENDIX I - WRIT OF EXECUTION

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

EXECUTION - GOODS, CHATTELS AND REAL ESTATE

Providence ,Sc Superior Court

Anthony A. Nunes, Inc.

)Civil Action
)File No.81-3187
)
)

V.

Raymond DeLeo

To the Sheriffs of our several Counties or to their Deputies, GREETING:

WHEREAS,

Anthony A. Nunes, Inc.

of

by the consideration of the SUPERIOR COURT, holden at Providence Returned to Superior Ct. 9/22/88 did on the 8th day of Nov.,

A.D. 1985 , recover judgment against _____
Raymond DeLeo _____
for the sum of 89,421.87 Compensatory Dam. _____
plus int $ 90,316.09 and punitive Dam. _____
$30,000.xx debt (or damages) and $48,000 _____
costs of suit, as to us appears of record,
whereof execution remains to be done:

We command you, therefore, that of the goods and chattels and real estate of the said Defendant Raymond DeLeo _____

_____

within your precinct, you cause to be levied and paid unto the said Plaintiff Anthony A. Nunes, Inc. _____ _____

_____

the aforesaid sums, being $209,785.96 _____
_____ cents in the whole with five dollars more for this writ and thereof also satisfy yourself for your own fees.

HEREOF fail not, and make true return of this writ and of your doings thereon to our Superior Court at Providence for our County of, Providence and Bristol on the 26th day of September, A.D.19 89

Witness, the Seal of our Superior Court, at Providence, this 26th day of Sept n the year one thousand nine hundred and 88

Thomas A. Palanzio, Senior Clerk.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Bristol, SC.

In Bristol in said County on this 29 day of Sept. A.D. 1988 I have this day at 9 o'clock and 00 minutes A.M. levied by recording the within Execution on all the right, title and interest which the within named defendant had on the day of A.D. 19 , at o'clock and minutes, the time of the

attachment on the original writ in the suit upon which this Execution was obtained, in and to the following described real estate, viz: As listed below

John O. Valents
Deputy Sheriff

Property of Raymond DeLeo
In Bristol, Rhode Island

Location	Assessor's Plat	Assessor's Lot
1. Lafayette Drive	151	171
2. Spring Street	157	78
3. Spring Street	157	79
4. Bourne Street	17	115
5. 128 High Street	20	11
6. Union Street	20	83
7. Hope Street	7	17
8. 320 High Street	17	127

APPENDIX J - APPELLANT'S
PRE-BRIEFING STATEMENT
SUBMITTED TO
THE RHODE ISLAND SUPREME COURT

STATE OF RHODE ISLAND SUPREME COURT
PROVIDENCE, SC

RAYMOND DeLEO	:	
	:	
vs.	:	C.A. No. 86-516
	:	
ANTHONY A. NUNES, INC., and SALLY APPLETON	:	

PRE-BRIEFING STATEMENT

STATEMENT OF THE CASE

Raymond DeLeo commenced this action to, "... determine the nature, extent and description of waterfront . . . riparian, littoral, and flat rights of the Plantiffs" in land in Bristol. Anthony Nunes, Inc. ("Nunes") was the owner/developer of the land, known as the "Walker's Cove" Development. Sally Appleton bought one of the lots at Walker's Cove and has constructed a house there. Mr. DeLeo is a neighbor and abutter who opposed the project.

The land at Walker's Cove is waterfront property and is composed of essentially two

parts-upland of mean high water of Narragansett Bay, and land filled pursuant to 1933 War Department and Rhode Island permits.

As part of his objections to the project,[1] Mr. DeLeo asserted that the public had certain rights to filled land below mean high water. Mr. DeLeo also claimed an interest in a triangle of the land conveyed to Ms. Appleton.

Mr. DeLeo made those assertions at public hearings before the Coastal Resources Management Council, Bristol Zoning Board and Town Council, and to other governmental entities with jurisdiction over the Walker's Cove development.

There was no evidence that Mr. DeLeo made any statements disparaging the title to Walker's Cove to any private individual, or

---

1/ At the various bodies before which he appeared, Mr. DeLeo raised other objections such as State Building Code violations, zoning and subdivision violations, sewage disposal and flood hazard problems.

newspaper or other advertising media or that he in any way sought to deter potential purchasers of the Walker's Cove lots.

As part of this action, which contested Nunes' absolute ownership of the subject land, Mr. DeLeo caused a Lis Pendens to be filed in the Land Evidence records of the Town of Bristol.

Upon motion of Nunes and an agreed statement of facts, Mr. Justice Almeida vacated the lis pendens on October 20, 1982. An appeal to this Court was dismissed without prejudice as premature by Mr. Justice Cochran on January 6, 1983. Thereafter, on December 7, 1982, Plaintiff's Complaint was dismissed on the rational of Mr. Justice Almeida's opinion.

On October 25, 1985, trial commenced upon Nunes' and Appleton's counterclaim. Through a series of amended counterclaims, Nunes and Appleton alleged slander of title, malicious prosecution and abuse of process.

Only the counts for slander of title survived a motion for a directed verdict at the end of Nunes' and Appleton's case in chief.

At trial, Nunes was allowed to adduce evidence of "lost opportunity" costs as damages resulting from the purported slander of title. Joseph W. Riker, Jr., a realtor, was allowed to calculate what Nunes' investment would have yielded as interest bearing securities as a measure of damages.

Anthony Nunes was allowed to testify to a minor bid dispute with Mr. DeLeo which occurred some twenty-five years prior to trial, as evidence of "malice" or "ill will".

Among other witnesses, Mr. DeLeo presented Donald Connors, Esq., who testified that indeed as a matter of federal and constitutional law, the public does retain certain rights in land filled below mean high tide.

After an eleven (11) day trial and introduction of approximately one hundred fifty exhibits, the jury deliberated for approximately two hours and returned verdicts in favor of Nunes and Appleton as follows:

Nunes	Compensatory	$104,114.87
	Punitive	75,000.00
Appleton	Compensatory	3,000.00
	Punitive	7,000.00

On DeLeo's Motion for a New Trial, Mr. Justice Gallant reduced Nunes Compensatory damages to $89,421.87, and punitive damages to $30,000.00. The Appleton verdicts were allowed to stand.

ISSUES PRESENTED

1. Whether the statements of Mr. DeLeo respecting the public's right in filled land are true.

2. Whether Mr. DeLeo's statements are constitutionally privileged.

3. Whether Mr. Justice Almeida erred in vacating the lis pendens.

4. Whether the trial court erred in dismissing Plaintiff's Complaint.

5. Whether Mr. Justice Gallant erred in denying DeLeo's Motion to Sever the trial of the Nunes counterclaim from the Appleton counterclaim.

6. Whether the trial court erred in denying DeLeo's Motion for a Directed Verdict on the slander of title counts. The privilege successfully asserted with respect to the claims of abuse of process and malicious prosecution is equally determinative of the issue of slander of title. Moreover, there was insufficient evidence of slander of title, malice, or damages to go to the jury.

7. Whether the trial justice adequately instructed the jury on the malice requisite to a finding of slander of title.

8. Whether the court erred in denying a motion to pass the case after it made a highly prejudicial remark respecting the effect of a lis pendens.

9. Whether the trial justice adequately instructed the jury on Mr. DeLeo's testimonial privilege to make statements on an issue of public interest before governmental boards, commissions and agencies having jurisdiction or color of jurisdiction over a development project.

10. Whether the trial justice applied to proper measure of compensatory damages and whether the Court erred in permitting testimony respecting lost opportunity costs.

11. Whether there was sufficient evidence to show that Mr. DeLeo's statements regarding title were the proximate cause of any damages.

12. Whether the trial court erred in denying DeLeo's Motion in Limine and allowed evidence of statements made beyond the one-year statute of limitations R.I.G.L. 9-1-14.

13. Whether the trial court erred in denying DeLeo's Motion for a New Trial.

Respectfully submitted,
RAYMOND DeLEO
By his Attorneys,

/s/ Gerard McG. DeCelles
GERARD McG. DeCELLES
Abedon, Michaelson,
Stanzler, & Biener
220 South Main Street
Providence, RI 02903

CERTIFICATION

I hereby certify that I mailed a true copy of the within Statement of the Case to William R. Grimm, Esquire, HINCKLEY, ALLEN, TOBIN & SILVERSTEIN, 1500 Fleet Center, Providence, RI 02903 and to Sean O. Coffey, Esquire, LICHT & SEMONOFF, 1 Park Row, Providence RI 02903 on this 4th day of February, 1987.

/s/ Lynn A. Sonatelli

APPENDIX K - EXCERPT FROM APPELLEE'S BRIEF FILED IN THE SUPREME COURT OF THE STATE OF RHODE ISLAND

III. ARGUMENT

A. UNDER SETTLED RHODE ISLAND LAW DeLEO HAS FAILED TO TAKE THE STEPS NECESSARY TO PROVIDE THIS COURT WITH JURISDICTION TO REVIEW HIS TITLE CLAIMS.

This action began on August 28, 1981 when DeLeo filed suit against Nunes in the superior court claiming that both DeLeo and the public own a portion of the parcel. DeLeo then filed two lis pendens against the parcel asserting these same claims.

In September of 1982, Nunes asked the superior court to vacate the lis pendens and to declare the lis pendens null and void. In a written decision dated October 20, 1982 and an order dated October 22, 1982, Judge Almeida granted Nunes' motion. (A. 252-58). Judge Almeida ruled that neither DeLeo nor the public had any interest in the parcel.

DeLeo did not appeal the order vacating the lis pendens.[1] Nunes therefore moved to dismiss the amended complaint. No issues remained because Judge Almeida necessarily and explicitly rejected the claims that DeLeo raised in the complaint when he vacated the lis pendens. Accordingly, Judge Cochran dismissed the complaint on December 7, 1982. (A. 259). DeLeo attempted to appeal the order of dismissal. Judge Cochran dismissed that appeal as premature since DeLeo did not receive certification pursuant to Rule 54(b) of the Rules of Civil Procedure. Then, after the trial on the counterclaim, DeLeo appealed only the judgment on the counterclaim, and not the order of dismissal.

1/ DeLeo asserts in his brief that he appealed the order vacating the lis pendens. (DeLeo brief, p.3). That is false. The superior court docket clearly shows that DeLeo tried to appeal from the order of dismissal; he never attempted to appeal the order vacating the lis pendens.

DeLeo asserts in his brief that he did not slander title to the parcel because he correctly stated that he and the public each own a portion of the parcel. He contends that in 1982, Judge Cochran erred in dismissing the amended complaint which raised these title claims, and that the trial court erred in failing to instruct the jury that DeLeo' s title claims were true. These contentions are frivolous because the record demonstrates that DeLeo failed to take any of the procedural steps necessary to preserve his title claims for appeal.

1. DeLeo's failure to appeal the order vacating the lis pendens collaterally estops him from again raising his title claims.

In October of 1982, Judge Almeida · rejected DeLeo's title claims and issued an order vacating the lis pendens. That order, and the accompanying decision, specifically decided and rejected DeLeo's title claims. That order was also final and appealable. Zito v. Eastside Associates, 119 R.I. 629,

381 A.2d 1364 (1978). In Zito, a Superior Court justice vacated a lis pendens and declared it null and void on September 12, 1977. The petitioner petitioned for certiorari on October 6, 1977. The Court ruled that "an order vacating a notice of lis pendens has the requisite finality on a matter which is collateral to the main action so as to be immediately appealable within the provisions of G.L. 1956 (1969 Reenactment) § 9-24-1." Zito, 119 R.I. at 630, 381 A.2d at 1365. The Court therefore denied the petition for certiorari because the petitioner had an adequate remedy of appeal under § 9-24-1.

DeLeo did not appeal the order vacating the lis pendens. Pursuant to settled Rhode Island law, the unappealed order vacating the lis pendens collaterally estops DeLeo and conclusively establishes for the purposes of this litigation that DeLeo's title claims are false. Cole v. Charron, 477 A.2d 959, 961 (R.I. 1984).

2. DeLeo' s failure to appeal the order dismissing his title claims precludes him from asserting those title claims in this appeal.

Rule 3 of the Rules of Appellate Procedure requires an appellant to specifically designate in his notice of appeal the judgment, order or decree appealed from. Here, DeLeo specifically appealed from the judgment on the counterclaim for damages returned by the jury, and not from the earlier order of dismissal. The notice of appeal form requires the appellant to list the date of the judgment or order appealed from. DeLeo did not list December 7, 1982, the date of the order of dismissal. He listed May 2, 1986, the date of the order denying his motion for a new trial on the counterclaim. DeLeo identified the judge on the matter appealed from as Mr. Justice Gallant, not Judge Cochran. In the section of the form entitled "Trial Court Action Appealed," he skipped over the box next to "Dismissal Merits," and checked the box next

to "Judgment/Jury." He then makes reference in several other sections of the form to the counterclaim, but never to his complaint. Nowhere does DeLeo refer to Judge Cochran's dismissal of his complaint. Finally, DeLeo ordered the transcript of the trial on the counterclaim; he did not order a transcript of the hearing on the motion to dismiss. In short, DeLeo did not specifically designate -- or even vaguely refer to -- Judge Cochran's order of dismissal.

This court lacks jurisdiction to review the order of dismissal because DeLeo failed to appeal that order. Title Ins. Co. of America v. Fowler, 504 A.2d 1010 (R.I. 1986). Thus, pursuant to established Rhode Island law, the Court should deny DeLeo's appeal and affirm the judgment below.

3. DeLeo's failure to request a charge that his title claims were true precludes him from raising the charge as an error on appeal.

DeLeo claims that the trial court erred because it failed to instruct the jury that

DeLeo's title claims were true.[2] DeLeo, however, submitted a written request to charge to the trial court that does not include an instruction that DeLeo's claims were true.[3] Under established Rhode Island law, DeLeo's failure to request the instruction precludes him from challenging the trial court's charge. Bernhart v. Nine, 120 R.I. 692, 391 A.2d 75 (1978). The Court should therefore affirm the judgment below.

In sum, the Court need not review the substantial portions of DeLeo's voluminous brief that discuss his title claims because those claims are not before this Court for review. It is clear that DeLeo failed to appeal the order vacating the lis pendens,

---

2/ Under the law of the case doctrine, Nunes should have received an instruction that DeLeo's claims were false in light of the prior orders of Judge Almeida and Judge Cochran. Salvadore v. Major Electric Supply, Inc., 469 A.2d 353 (R.I. 1983).

3/ DeLeo also did not request a directed verdict on the ground that his title claims were true.

failed to appeal the order of dismissal, and failed to request the instruction that he alleges the trial court refused to give. Each one of these failures precludes DeLeo from raising his title claims on appeal. Thus, pursuant to settled Rhode Island law, the Court should affirm the judgment below.

APPENDIX L - EXCERPT FROM APPELLANT'S BRIEF IN REPLY BEFORE THE SUPREME COURT OF THE STATE OF RHODE ISLAND

STATE OF RHODE ISLAND

PROVIDENCE, SC., ss:

SUPREME COURT

RAYMOND DeLEO,,	)
Appellant,,	)
v.	)
Appeal No. 86-516	)
ANTHONY A. NUNES, et al,,	)
Appellees.	)

APPELLANT'S BRIEF IN REPLY

II. The Public Trust Issue Is Properly Before The Court.

Appellees conveniently and conspicuously omit any reference to RCP 54(b), which provides:

> When more than one claim for relief is presented in an action, whether as a claim, [or] counterclaim . . . the court may direct the entry of a final judgment as to . . . fewer than all of the claims or parties . . . only upon an express determination that there is no just

reason for delay, and upon an express direction for the entry of judgment.

This was never done. Neither the trial court, sua sponte, nor either party sought to accelerate entry of judgment, from which an interlocutory appeal could be taken. Clearly, the dismissal entered by Mr. Justice Cochran ". . . was not a final judgment for purposes of appeal since not all of the rights and liabilities of the parties had been adjudicated". See Pearson v. Old Stone Savings Bank, 119 R.I. 836, 383 A.2d 1029 (1978), Westinghouse Broadcasting Co., Inc. v. Dial Media, Inc., R.I. , 410 A.2d 986 (1980).

Since this Court does not tolerate fragmented appeals, the entire case is now properly before the Court. See Maloney v. Daley, 115 R.I. 375, 346 A.2d 120 (1975). It is from the final judgment that an appeal is taken. Appellee's microscopic examination of the Notice of Appeal form is of no avail. Even assuming, arguendo, that

another box should have been checked, "an appeal from a judgment preserves for review any claim of error in the record . . . " Appellate Rule 4.

Furthermore, "failure of an appellant to take any step other than timely filing of notice of appeal . . . does not affect the validity of an appeal." Appellate Rule 3(a) See also Martin v. Estrella, 107 R.I. 247, 266 A.2d 41 (1970).

IV. Mr. DeLeo Properly Raised and Preserved The Petitioning and Public Interest Privilege Defenses At Trial, Both In His Motion for Directed Verdict and In His Request For Jury Instructions.

Like most appellees faced with meritorious arguments on the part of an appellant, Nunes' hypertechnical procedural contentions extend to every issue, even to matters of important public policy (as with the Public Trust Doctrine discussed above) and vital constitutional principles. Thus, Nunes argues that Mr. DeLeo cannot assert the constitutional petitioning or public

interest privileges before this Court because the defenses were allegedly not properly preserved below. Nunes has overlooked the fact that Mr. DeLeo moved for a directed verdict based on these privileges, and also requested jury instructions related to the privileges, which were denied by the Court. See e.g., Tr. IV 244, and DeLeo's Requests to Charge 6, 16, 30,31. It is well-settled that where a defendant's motion for directed verdict is erroneously denied by the trial judge, a judgment for the plaintiff should not go unreversed simply because the judge has charged the jury in accordance with the same misconception without an additional objection by the defendant.. 1 R. Kent, Rhode Island Practice §51.4 (1969). Because Mr. DeLeo raised the privilege issue in his motion for directed verdict, he may now properly appeal the trial court's erroneous

rejection of matters raised by that motion to this Court.

Moreover, as noted above, Mr. DeLeo did raise the privilege issue in his request for jury instructions. While the Court granted one of Mr. DeLeo's requests on the public interest privilege, it wrongfully denied Mr. DeLeo's request for a charge on the privilege associated with comment on matters of public interest, a privilege which is inextricably entwined with the constitutional petitioning privilege. Therefore, Mr. DeLeo has properly preserved the issues for appeal.

Even if Mr. DeLeo had not adequately requested instructions or moved for a directed verdict based on the privilege defenses, this Court may in its discretion, still consider the fundamental and prejudicial errors made by the trial court. See, e.g., Freifield v. Hennessy, 353 F.2d 97, 99 (3d Cir. 1965); Pruett v. Marshall,

283 F.2d 436, 441 n.3 (5th Cir. 1960); Watkins v. Grover, 508 F.2d 920, 921 (9th Cir. 1974); Nimrod v. Sylvester, 369 F.2d 870, 873 (1st Cir. 1966); Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 286 (5th Cir. 1975); Ferrara v. Sheraton McAlpin Corp., 311 F.2d 294, 297-98 (2d Cir. 1962). This rule is especially applicable in this case where a party's constitutional rights and vital public interests are at stake, and where public policy is involved. See Phelps v. Bay State Realty corp., ___ R.I. ____, 425 A.2d 1236 (1981) (public policy involved); Taylor v. National Trailer Convoy, Inc., 433 F.2d 569 (10th Cir. 1970) (due process rights at stake). Therefore, even if this Court finds that Mr. DeLeo did not fully technically preserve for review the petitioning and public interest privilege defenses, the Court nevertheless should review the errors of the trial court to avoid manifest injustice and the

deprivation of Mr. DeLeo's constitutional rights, as well as the chilling of the exercise of the petitioning rights of all citizens concerned with protecting the public interest, as would occur if the judgment below is not reversed.

APPENDIX M - CONSENT TO REMITTITUR

STATE OF RHODE ISLAND PROVIDENCE, SC.		SUPERIOR COURT
RAYMOND DeLEO and ANNA A. DeLEO	:	
v.	:	C.A.No.81-3187
ANTHONY A. NUNES, INC., WALKERS COVE ASSOCIATION, INC., DANIEL APPLETON and SALLY APPLETON	:	

REMITTITUR

Defendant/counterclaimant, Anthony A. Nunes, Inc. hereby accepts the remittitur of its compensatory damage verdict against Raymond DeLeo ("DeLeo") for all amounts awarded in excess of $89,421.87 and a remittitur of its punitive damage verdict

against DeLeo for all amounts awarded in excess of $30,000.00 as ordered by the Court.

ANTHONY A. NUNES, INC.

By its Attorneys,

s/William R. Grimm
William R. Grimm
HINCKLEY, ALLEN, SNYDER & COMEN
1500 Fleet Center
Providence, RI 02903
(401) 274-2000

CERTIFICATION

To: Gerard McG. DeCelles, Esq.
355 Thayer Street
Providence, RI 02906

Sean O. Coffey, Esq.
LICHT & SEMONOFF
One Park Row
Providence, RI 02903

Kenneth Laurence
Michael E. Samuels
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, MA 02109

Carla Bregman, Attorney
Armond Cohen, Esq.
Richard S. Emmet, Esq.
Attorneys for the Conservation
Law Foundation of New England, Inc.
Three Joy Street
Boston, MA 02108

I hereby certify that I mailed a copy of the within Remittitur to counsel of record, as above, on the 23rd day of September, 1988.

_____

APPENDIX N - RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

RHODE ISLAND SUPREME COURT RULE 3

Appeal - How taken. - (a) Filing the Notice of Appeal. An appeal permitted by law from a trial court to the Supreme Court shall be taken by filing a notice of appeal in the trial court. Failure of an appellant to take any step other than the timely filing of a notice of appeal or payment of a filing fee as prescribed by these rules does not affect the validity of the appeal, but is ground only for such action as the Supreme Court or trial court deems appropriate, which may include dismissal of the appeal.

(b) Joint or Consolidated Appeals. If two (2) or more persons are entitled to appeal from a judgment or order of a trial court and their interest [sic] are such as to make joinder practicable, they may file a joint notice of appeal, or may join in

appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court upon its own motion or upon motion of a party to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal and shall designate the judgment, order or decree or part thereof appealed from.

(d) Service of the Notice of Appeal. The clerk of the trial court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at his last known address, and shall mail or deliver a copy of the notice of appeal to the clerk of the Supreme Court. The clerk of the trial court shall note on each copy served the date on

which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or his counsel. The clerk shall note in the docket the names of the parties to whom he mails copies, with the date of mailing. (As amended August 18, 1976, effective September 1, 1976.)

RHODE ISLAND SUPREME COURT RULE 4

Appeal - When taken. - (a) Appeals in Civil Cases. In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within twenty (20) days of the date of the entry of the judgment, order, or decree appealed from together with a filing fee of one hundred dollars ($100). If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within twenty (20) days of the date on which the first notice of appeal was filed, or within the

time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the Superior Court by any party pursuant to the Rules of Civil Procedure of the Superior Court hereafter enumerated in this sentence, or by a timely motion filed in the Family Court for comparable relief pursuant to the rules of that court, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders or comparable orders of the Family Court made upon a timely motion under such rules: (1) granting or denying a reserve motion under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or

denying a motion under Rule 59 to alter or amend the judgment; or (4) granting or denying a motion for a new trial under Rule 59. An appeal from a judgment reserves for review any claim of error in the record including any claim of error in any of the orders specified in the preceding sentence. An appeal from such an order shall be treated as an appeal from the judgment. A judgment, order, or decree is entered within the meaning of this subdivision when it is set forth and signed by the clerk of the trial court in accordance with the applicable rules of the trial court.

Upon a showing of excusable neglect, the trial court may extend the time for filing the notice of appeal by any party for a period not to exceed thirty (30) days from the expiration of the original time prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this

subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the Superior Court within twenty (20) days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction if the motion is made before or within ten (10) days after entry of the judgment. A judgment or order is entered within the meaning of this

subdivison when it is entered in the criminal docket. Upon a showing of excusable neglect the Superior Court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this subdivision.

RHODE ISLAND SUPREME COURT RULE 16(h)

Within fifteen (15) days after the docketing of the record of an appeal, in a civil case with the Clerk of the Supreme Court, the appellant or other moving party shall file a statement of the case and a brief summary of the issues proposed to be argued on a appeal; this document shall be concise, not exceeding five pages. The party may take out the transcripts from the Clerk's Office for reference in the preparation of the statement but shall return them when the statement is filed.

Within ten (10) days after the filing of the above statement, the responding party shall file a counter-statement, not to exceed five pages. The transcripts may be taken out for reference in preparing this counter-statement but shall be returned upon its filing. Following the filing of such statements, the court may require appearance before a single justice of the court for a conference, the objectives of which will be (1) to achieve settlement of dispute, and (2) to determine the issues on appeal. In the event that the single justice of the court deems it appropriate, he or she may require the issuance of an order to show cause by either party why the appeal should not be dismissed or the judgment below should not be reversed, modified, or the matter remanded for further proceedings. In those cases in which show cause orders are issued, counsel for either party may submit a supplemental statement not exceeding 10

pages. Unless otherwise ordered, the appellant or other moving party may cause order; the responding party may file a counter-statement within ten days thereafter. The show cause argument may be conducted before a hearing panel may issue an order dismissing the appeal, reversing or modifying the judgment, or remanding the case to the appropriate trial court for further proceedings. The panel may if it sees fit determine that the case should be placed on the regular calendar for full hearing and argument.

RHODE ISLAND SUPERIOR COURT RULE OF CIVIL PROCEDURE 54(b)

Judgment Upon Multiple Clams or Involving Multiple Parties. When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third party claim or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims

or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

APPENDIX O - NEWSPAPER ARTICLES

(1) Holzberg, Defamation Suits 'Chill' Activists, National Law Journal, July 25, 1988, at 3, col. 1.

A RASH OF recent defamation suits against civic activists threatens to transform the nature of citizen participation in local government, according to a soon-to-be released study conducted at the University of Denver.

Law Prof. George W. Pring and Asst. Sociology Prof. Penelope Canan's report, "Strategic Lawsuits Against Public Participation," a copy of which has been obtained by The National Law Journal, found more than 100 lawsuits have been filed by developers against citizen opponents of projects in 26 states and Washington, D.C.

Such suits, according to Professor Canan, are enlisting courts to suppress what previously had been protected political behavior. These controversies are best resolved by local governments, the study

concludes.

Professors Pring and Canan are co-directors of the continuing Intimidation Lawsuit Project at the university. The project is documenting and analyzing lawsuits brought against individuals because of their involvement with government proceedings.

Because many of these new defamation cases are settled or dismissed, tracking all the cases is difficult. But "wherever we scratch the surface, we seem to find new examples of such suits," said Professor Canan.

Few of the defamation cases end in verdicts against the defendants, according to the study. But that is often not their purpose, said Professor Pring. "Their success comes from fear, protraction and the high cost of defense."

"It's a case of somebody with an awful lot of money suing a lot of little people to

try to stop them from voicing their opinions," said George Nager, a Mineola, N.Y., sole practitioner.

Mr. Nager is defending a Wantagh, N.Y., woman, Betty Blake, who was hit with a $6.5 million defamation suit after she picketed a building site near her home with a sign that read: "This neighborhood will not be Terraized."

That builder, Terra Homes, a Long Island-based residential developer, was not amused. "I don't say they don't have a right to protest," said Anthony Citarelli, a co-owner and officer of Terra Homes. "But they don't have a right to call me a terrorist."

Developers claim the defamation action is often their only recourse against residents who force delays in projects. Mr. Citarelli said he lost years and a lot of money on his effort to build two houses near Ms. Blake because the protests delayed

governmental approval of the project.

Professor Canan said the defamation suits typically attack civil activists on the basis of their advocacy of a community issue before a government body. Developers often file the suits after activists succeed in having local government delay projects, she added.

Even though some 83 percent of the cases ultimately are dismissed, according to Professor Pring, few citizen defendants can afford to bear such litigation expenses, which are rarely covered by insurance. Instead, many citizens, once sued, drop out of the civic area in exchange for dismissal of the claims, Professor Pring reported. "Civic participation is chilled by such suits," he added.

In one Colorado action, which was ultimately dismissed, activist Betty Johnson petitioned to obtain a moratorium on the annexation of properties that would have

hastened development of the town of Louisville. When the Town Board agreed to enforce the moratorium, one developer sued Ms. Johnson for "unlimited damages" caused by her petition.

One local attorney told Ms. Johnson it would cost more than $10,000 to defend the suit, a fee Ms. Johnson said she would not have been able to pay. Eventually, the Colorado Civil Liberties Union defended her. But "what happens if someone or group won't take a case like that?" Ms. Johnson asked.

In direct response to these suits, a number of states - including California, Oklahoma and New York - are considering legislation to make it more difficult for developers to charge a civil opponent with defamation.

New York State's Legislature is expected to debate one such bill later this month. Republican State Assemblyman Robert

Gaffney said his bill would classify any entity that seeks to obtain a permit or license from a public agency as a public figure and require them to prove they were defamed with "actual malice" - a much higher standard than that presently used. Losing plaintiffs could be ordered to pay defendants' attorney fees.

Many developers have denounced the New York bill. In complying with such a law, "a builder basically has no protection from being libeled," said Robert A. Wieboldt, executive vice president of the New York State Builders Association. Developers have posed similar objections to bills proposed in California and Oklahoma this year.

Henry M. Kaufman, general counsel for the Libel Defense Resource Center, said that "since defamation is a creature of the state," such laws will likely withstand challenge. Even so, Mr. Kaufman added, raising developers to the status of public

figures would probably not deter frivolous suits.

(2) Slander-of-Title Ruling Affirmed by Supreme Court, Rhode Island Builder Report, October, 1988

The State Supreme Court has affirmed a slander-of-title judgment awarded Anthony A. Nunes, Inc. of Bristol in Superior Court against Raymond A. DeLeo, also of Bristol, in a case that could provide a tool for owner/developers to fight false claims against their projects.

In a unanimous decision, the high court also confirmed Mr. Nunes' right to sue Mr. DeLeo for abuse of process and malicious use of process arising out of Mr. DeLeo's efforts to stop Mr. Nunes' development. In the decision, the court let stand a judgment against Mr. DeLeo on the slander-of-title count which exceeds $209,000 including interest and punitive damages.

William R. Grimm and Gerald J. Petros of the Providence law firm of Hinckley,

Allen, Snyder & Comen, represented Mr. Nunes in the litigation. Mr. Grimm noted that "the Nunes case could provide a substantial and effective tool for owners/developers in situations where their properties or development projects are delayed by objectors making spurious and false claims."

The case has been in the courts since September of 1981 when Mr. Nunes sued Mr. DeLeo for damages arising out of Mr. DeLeo's efforts to block Mr. Nunes' development at Walker's Cove in Bristol.

In its decision, the court stated that "there is ample evidence that DeLeo's continuous and lengthy efforts to block the development of Nunes' five-lot parcel was motivated by the ill will and hostility he has for his competitor Nunes."

The court further acknowledged that the "filing of a lis pendens can become a pernicious practice that has the same effect

as attaching one's property without the benefit of a court hearing."

APPENDIX P - STIPULATION TO STAY PENDING APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATE OF RHODE ISLAND — SUPERIOR COURT
PROVIDENCE, SC.

RAYMOND DeLEO	:	
	:	
VS.	:	C.A.No.81-3187
	:	
ANTHONY A. NUNES, INC.	:	
ET AL.	:	

STIPULATION

It is hereby agreed between the parties that:

1. Enforcement of the judgment and execution in favor of Anthony A. Nunes, Inc. ("Nunes") is hereby stayed pending final determination of Raymond DeLeo's appeal to the United States Supreme Court from the Rhode Island Supreme Court decision in C.A. No. 86-516-A.

2. Further proceedings in this Court on Nunes' claims for abuse of process and malicious use of process against Raymond

DeLeo are also stayed pending such determination on DeLeo's appeal to the United States Supreme Court.

Raymond DeLeo

By his Attorney

Gerard McG. DeCelles
355 Thayer Street
Providence, RI 02906

ANTHONY A. NUNES, INC.
By its Attorneys,

William R. Grimm
HINCKLEY, ALLEN, SNYDER & COMEN
1500 Fleet Center
Providence, RI 02903

ENTER: ORDER:

Dated:

(3)

Supreme Court, U.S.
FILED
FEB 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1013

In The

Supreme Court of the United States

October Term, 1988

RAYMOND DE LEO and ANNA A. DE LEO,

Appellants,

v.

ANTHONY A. NUNES, INC., and SALLY APPLETON,

Appellees.

On Appeal From The Supreme Court Of The State of Rhode Island And Providence Plantations

APPELLEE ANTHONY A. NUNES, INC.'S MOTION TO DISMISS

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February 17, 1989

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20p

QUESTION PRESENTED

Whether the Court should dismiss this appeal because the appeal does not present a substantial federal question, the judgment below rests on adequate non-federal grounds and the federal questions presented were neither timely raised nor expressly passed on?

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No. 88-1013

In The

Supreme Court of the United States

October Term, 1988

RAYMOND DE LEO and ANNA A. DE LEO,

Appellants,

v.

ANTHONY A. NUNES, INC., and SALLY APPLETON,

Appellees.

On Appeal From The Supreme Court Of The State of Rhode Island And Providence Plantations

APPELLEE ANTHONY A. NUNES, INC.'S MOTION TO DISMISS

Appellee Anthony A. Nunes, Inc. pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States, respectfully requests that this Court dismiss the within Appeal from the Supreme Court of the State of Rhode Island.

PRELIMINARY STATEMENT

Appellee Anthony A. Nunes, Inc. ("Nunes")[1] pursuant to Rule 16.1 of the Rules of the Supreme Court of the United States respectfully requests that this Court dismiss the appeal of appellants, Raymond DeLeo and Anna A. DeLeo ("DeLeo"),[2] from the decision of the Supreme Court of the State of Rhode Island.

In his Jurisdictional Statement, DeLeo argues that the Supreme Court of Rhode Island violated his due process and first amendment rights when that court enforced its appellate Rule 3(c). When DeLeo appealed to the Rhode Island Supreme Court, he failed to appeal from an earlier judgment which dismissed with prejudice DeLeo's claims that he and the public had an interest in the real estate in question. Because of this failure, the Rhode Island Supreme Court refused to consider DeLeo's public trust doctrine arguments. DeLeo now claims that the Rhode Island Supreme Court violated his due process rights by refusing to consider these arguments and enforcing its appellate rule which requires appellants to specify the judgment or order appealed from.

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1 Pursuant to Supreme Court Appellate Rule 28, Nunes states that it is a subsidiary of The Nunes Company and is the parent corporation of Metacom Equipment & Supply Co.

2 The suit against Anna DeLeo was dismissed at the trial court level. She was not a party to the Rhode Island Supreme Court appeal, nor is she a proper appellant here. "DeLeo" will refer only to Raymond DeLeo throughout this motion to dismiss.

Despite DeLeo's passionate assertions, this is not a case of constitutional magnitude, but merely a state court tort action. The trial court jury, the trial judge and a unanimous Rhode Island Supreme Court found that DeLeo had intentionally and maliciously made numerous false statements (including the filing of two lis pendens) about Nunes' title to certain real estate, and that Nunes had suffered special damages as a result of this conduct. DeLeo's conduct was sufficiently malicious to support an award of punitive damages, also affirmed on appeal.

DeLeo's appeal does not present a substantial federal question, the judgment rests on adequate independent state grounds and the federal questions DeLeo asks this Court to review were not timely raised or expressly passed on. The Court should dismiss the appeal.

FACTS AND TRAVEL OF THE CASE

In April of 1979, Nunes purchased 2½ acres of waterfront property (the "parcel") along Hope Street in Bristol, Rhode Island at Walker's Cove. The parcel borders Narragansett Bay. A portion of the parcel consists of land filled by Nunes' predecessor in title, Herreshoff Manufacturing Company ("Herreshoff"), in 1933 pursuant to valid authorization and permits from the State Harbor Commission and the United States Secretary of War.

Early in 1980, Nunes decided to divide the parcel into five lots and develop the area for single family homes (the "development"). Nunes informed the Bristol Planning Board of its proposed development. Because the parcel abuts Narragansett Bay, Nunes needed approvals

from the state's Coastal Resource Management Council ("CRMC") and the Army Corps of Engineers (the "Corps") before beginning construction. Nunes applied for the necessary permits to repair sections of the seawall, to build some docks, and to construct a home.

At this point, DeLeo began his crusade to stop Nunes from developing the parcel which sits across the street from DeLeo's home. DeLeo objected to the CRMC and Corps applications and actively sought a revocation and reconsideration of the Planning Board decision. He repeatedly asserted before all of these agencies and the Bristol Town Council that Nunes did not own the entire parcel. DeLeo alleged that he owned a triangular section at the northwest corner of the parcel and that the public owned another undefined section of the parcel comprising the filled area. DeLeo did not assert these claims prior to Nunes' acquisition of the parcel. Two local newspapers, the *Bristol Phoenix* and the *Providence Journal*, widely reported DeLeo's claims and attempts to scuttle the development.

After a number of hearings, the Planning Board again approved the development on June 19, 1980. DeLeo appealed the decision to the Platting Board where he repeated his claims. That board also rejected DeLeo's claims.

DeLeo succeeded in delaying the development by dragging out the CRMC hearings. He also appealed to the Bristol Zoning Board and called for public hearings before the Town Council. He wrote letters or sent copies to people not remotely connected with the permitting process, and took whatever steps he could to stop the

development. Ultimately, every agency rejected DeLeo's spurious claims. CRMC issued its assent to Nunes in April, 1981 and the Corps granted its permit in June, 1981.

On September 11, 1981, Nunes sold a lot to Sally Appleton. A few days later, DeLeo filed suit against Nunes and claimed again that he and the public owned portions of the parcel. DeLeo also filed a notice of lis pendens in the Bristol Land Records asserting these same claims to the parcel. The lis pendens clouded title to the parcel and prevented Nunes from selling any other lots in the development. Later, DeLeo amended his complaint to add Sally Appleton and her husband (the "Appletons") as defendants and filed a second lis pendens against their title. Nunes counterclaimed for DeLeo's slander of Nunes' title to the parcel.

On October 7, 1981, the Appletons applied to CRMC for a permit to construct their home. Undaunted by his earlier failures, DeLeo again objected and asserted his so-called "title interests." DeLeo caused CRMC to hold numerous and lengthy hearings on the Appletons' application. At the same time, Nunes began work necessary to repair the seawall. DeLeo complained to the Corps about that work. The Corps checked the site and dismissed DeLeo's claim as unfounded.

In 1982, Nunes applied to the Corps for a permit to remove a triangular piece of the Appletons' lot and to fill in that area to straighten the lot line and create a uniform lot to prevent erosion. DeLeo objected. As work progressed, DeLeo continuously complained to police and to the Corps regarding allegedly unauthorized work. The

Corps found DeLeo's claims unsubstantiated. DeLeo physically interfered with the work by getting in the way (standing under the shovel of a crane) and voicing his complaints and "ownership" claims to workers at the development.

In late 1982, DeLeo began a letter-writing campaign against the development. He accused everyone and every agency of complicity and failure to perform regulatory functions. He also repeatedly asserted his title claims. DeLeo wrote or sent copies of letters to: 1) CRMC; 2) the Corps; 3) Bristol Town Council; 4) Bristol Zoning Board; 5) Bristol Planning Board; 6) Bristol Economic Development Council; 7) Senator John Chafee; 8) Senator Claiborne Pell; 9) Congressman Fernand St. Germain; 10) Congresswoman Claudine Schneider; 11) David Stockman; 12) Department of the Interior; and 13) Sarah Amaral, Bristol Town Administrator.

DeLeo did not confine his attacks to the development; he went after Nunes as well. In earlier days, Nunes and DeLeo competed as contractors in bid disputes. In his flood of letters attacking the development, DeLeo demeaned Nunes as crafty and brazen. DeLeo accused Nunes of participation in an illegal conspiracy to circumvent the regulations pertaining to the development. Then, after one of the many hearings that DeLeo put Nunes through, DeLeo promised to put Nunes through 50 more battles before the project was completed. In this instance, DeLeo was true to his word.

Despite DeLeo's vigorous attacks, on September 28, 1982, Nunes obtained the approvals necessary to construct the Appleton home. At the same time, Nunes

moved to quash the baseless action filed by DeLeo. Upon motion by Nunes, Superior Court Justice Almeida ruled on October 20, 1982, that DeLeo had no title interest in the parcel and that a grant by the state and federal governments in 1933 extinguished the public rights in the parcel. Judge Almeida declared null and void and vacated the two lis pendens filed against the parcel by DeLeo.

DeLeo did not appeal Judge Almeida's order. No issues remained because Judge Almeida necessarily and explicitly rejected the claims that DeLeo raised in the complaint when he vacated the lis pendens. Accordingly, upon motion by Nunes, Judge Cochran dismissed DeLeo's complaint in December, 1982.[3]

DeLeo ignored the judgment of the Rhode Island Superior Court and continued to assert his title claims and harass Nunes and the Appletons. He appealed the grant of the Appletons' building permit, wrote letter after letter, requested hearing after hearing before the Town Council, and complained to the police and the Corps about the construction. When Nunes removed the triangular piece pursuant to CRMC and Corps approval, DeLeo complained to the police and the assembled press that the "land was his" and he interfered with its removal. This occurred nearly three (3) months after

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[3] In 1982, DeLeo attempted to appeal Judge Cochran's order of dismissal. Judge Cochran dismissed the appeal as premature since DeLeo did not request or receive the certification required pursuant to Rule 54(b) of the Rhode Island Rules of Civil Procedure for appeals of less than all claims.

Judge Almeida ruled that DeLeo had no interest in the parcel.

DeLeo's slanderous and improper activities increased Nunes' costs of development, required Nunes to pay legal fees to obtain removal of the lis pendens, and, most importantly, rendered the development unmarketable.

The trial of Nunes' claims against DeLeo began on October 28, 1985, and lasted two weeks before Judge Gallant. Judge Gallant directed a verdict in favor of DeLeo on Nunes' claims for malicious use of process and abuse of process, and sent the case to the jury on the slander of title claim. The jury returned a verdict in favor of Nunes for $104,114.87 in compensatory damages and $75,000.00 in punitive damages. Thereafter, Judge Gallant denied DeLeo's motion for a new trial on liability, but granted DeLeo's motion for a new trial on damages unless Nunes filed a remittitur for compensatory damages in excess of $89,421.89 and punitive damages in excess of $30,000.00.

On May 19, 1986, DeLeo filed a notice of appeal in which he specifically appealed from the judgment dated May 2, 1986 and the denial of his motion for a new trial. DeLeo did not appeal Judge Cochran's Order dismissing DeLeo's original complaint. The notice of appeal form requires the appellant to identify and list the date of the judgment or order appealed from. DeLeo did not list December 7, 1982, the date of the order of dismissal. He listed May 2, 1986, the date of the order denying his motion for a new trial on the counterclaim. DeLeo identified the judge on the matter appealed from as Mr. Justice Gallant, not Judge Cochran. In the section of the form

entitled " Trial Court Action Appealed," he skipped over the box next to "Dismissal Merits," and checked the box next to "Judgment/Jury." He then made reference in several other sections of the form to the counterclaim, but never to his complaint. Finally, DeLeo ordered the transcript of the trial on the counterclaim; he did not order a transcript of the hearing on the motion to dismiss. In short, DeLeo did not specifically designate – or even vaguely refer to – Judge Cochran's order of dismissal.

Nunes submitted its pre-briefing statement pursuant to Rhode Island Supreme Court Rule 16(h) on April 9, 1987. Among the several issues presented, Nunes squarely raised the issue of whether DeLeo properly perfected his appeal from Judge Almeida's written decision and order of October 27, 1982 and Judge Cochran's order dated December 7, 1982. DeLeo's brief, filed on October 15, 1987, did not address whether the Rhode Island Supreme Court had jurisdiction to review DeLeo's title claims in light of his failure to comply with Rule 3(c), nor did DeLeo suggest that any constitutional infirmity would arise if the court refused to consider DeLeo's title claims. On November 13, 1987, Nunes filed a motion to affirm the trial court's judgment pursuant to Rhode Island Supreme Court Rule 16(g). In that motion, Nunes discussed in detail the basis for its assertion that DeLeo failed to preserve for review his title claims. Among the grounds asserted by Nunes (and ultimately relied on by the Rhode Island Supreme Court) was DeLeo's failure to comply with the procedural requisites of Rhode Island Supreme Court Rule 3(c). Nunes reiterated its jurisdictional arguments in it brief, filed on March 7, 1988. DeLeo's reply brief, submitted on April 29, 1988, did not

raise any of the constitutional claims which DeLeo now asks this Court to consider.

Finally, at oral argument in May, 1988, DeLeo did not assert that DeLeo's due process rights would be infringed if the Rhode Island Supreme Court did not consider DeLeo's title claims because of his failure to comply with Rule 3(c). In fact, DeLeo did not raise the issues presented to this Court until DeLeo filed his petition for reargument on August 29, 1988. DeLeo had three clear opportunities to raise the constitutional issues between April, 1987 when Nunes first raised the Rule 3(c) issue and May, 1988 when the Rhode Island Supreme Court heard oral argument. DeLeo chose not to address the constitutionality of Rule 3(c) until after the Rhode Island Supreme Court had applied the rule in accordance with its customary practice.

For the reasons stated below, this Court should dismiss DeLeo's appeal.

ARGUMENT

A. THIS COURT SHOULD DISMISS THIS APPEAL BECAUSE IT DOES NOT RAISE SUBSTANTIAL FEDERAL QUESTIONS AND THE JUDGMENT BELOW RESTS ON ADEQUATE INDEPENDENT STATE GROUNDS.

1. The Rhode Island Supreme Court's consistent application of its appellate Rule 3(c) does not raise a substantial federal question.

Rule 3(c) of the Rhode Island Supreme Court Rules of Appellate Procedure states:

> The notice of appeal shall specify the party or parties taking the appeal and shall designate the judgment, order or decree or part thereof appealed from.

A plain reading of this language and an examination of the Notice of Appeal form tells an appellant that he must take certain steps to perfect an appeal.

Here, DeLeo did not appeal from Judge Cochran's dismissal of his complaint which alleged that both he and the public owned interests in the parcel under the public trust doctrine. Initially, DeLeo suggested that he actually did appeal this dismissal, but now admits that he chose not to appeal for tactical reasons. Whatever the reasons, DeLeo did not appeal Judge Cochran's decision and the Rhode Island Supreme Court did not have appellate jurisdiction over the dismissal of his complaint. As a result, the Rhode Island Supreme Court refused DeLeo's invitation to reverse state law concerning ownership of validly filled tidal land.[4]

DeLeo asserts that he has been ambushed by the Rhode Island Supreme Court's "novel" application of Rule 3. He states that the court's action denied him due process of law. This claim is frivolous. An appellant is not deprived of due process by a state court's consistent application of its procedural rules. *Gasguet v. Lapeyre*, 242 U.S. 367, 369 (1917); *see also Herndon v. Georgia*, 295 U.S. 441 (1935). Moreover, this Court recognizes that where a

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[4] The question of whether DeLeo and/or the public owned a portion of Nunes' parcel is controlled by state law. *Phillips Petroleum Co. v. Mississippi*, 108 S.Ct. 791, 794 (1988) (state law controls issue of whether state may vest title to public trust lands in private parties).

state's highest court consistently applies a state procedural rule to foreclose consideration of an issue on appeal, the state court's decision rests on independent adequate state grounds. *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978); *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977).

The Rhode Island Supreme Court has consistently held that failure to follow Rule 3 divests the court of jurisdiction and gives res judicata effect to the unappealed judgment. *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984); *Smith v. Smith*, 119 R.I. 642, 645 n.1, 382 A.2d 182, 183-84 n.1 (1978); *D'Agostino v. Yellow Cab Co. of Providence*, 104 R.I. 168, 169, 243 A.2d 98, 99 (1968). In *Hood*, the plaintiffs filed a notice of appeal specifying their appeal from the dismissal of their complaint against two defendants on May 20, 1981. The court held that the plaintiffs' failure to specifically designate the trial court's May 22, 1981 dismissal of their complaint against two additional defendants divested the court of appellate jurisdiction and gave the unappealed judgment res judicata effect. The court stated:

> Rule 3 of the Supreme Court Rules provides that an appellant, in order to perfect an appeal to this court, must specify in his notice of appeal what judgment, order, or decree or part thereof is being appealed and he also must specify the date it was entered.

Hood, 478 A.2d at 184. This Court recently agreed that compliance with the substantially identical federal appellate rule is a jurisdictional prerequisite. *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405 (1988).

In view of the plain language of Rule 3 and the Rhode Island Supreme Court's consistent application of

the Rule, DeLeo should have known that to preserve his state law public trust doctrine claims as an issue in the case he was required to appeal from Judge Cochran's dismissal of his complaint.[5] The Rhode Island Supreme Court's application of Rule 3 comports with due process. DeLeo's appeal should be dismissed because it does not present a substantial federal question.

2. DeLeo's first amendment petitioning claims are not substantial and DeLeo's tort liability rests on adequate non-federal grounds.

DeLeo claims that his false statements slandering Nunes' title are constitutionally protected as petitioning activity. DeLeo is wrong for two reasons.

First, malicious speech uttered in connection with petitioning activity is not protected by the First Amendment. *McDonald v. Smith*, 472 U.S. 479, 484 (1985).[6] The Rhode Island Supreme Court thoroughly reviewed the jury's and trial court's finding that DeLeo's false statements were made with malice and concluded that ample evidence existed to support this finding. *DeLeo v. Anthony A. Nunes, Inc.*, 546 A.2d 1344, 1346-47 (R.I. 1988).

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[5] DeLeo's failure to immediately appeal Judge Almeida's order vacating the lis pendens presents an additional independently adequate state ground for dismissing this appeal. *Zito v. East Side Associates*, 119 R.I. 629, 381 A.2d 1364 (1978).

[6] Moreover, DeLeo failed to request the trial judge to charge the jury on the right to petition. Under state law, this omission barred him from raising the issue on appeal. *Bernhart v. Nine*, 120 R.I. 692, 391 A.2d 75 (1978).

Second, DeLeo's tort liability does not rest solely on his alleged petitioning activity. DeLeo's substantial non-petitioning activity (e.g. DeLeo asserting his title claims to construction workers and police and his letter writing campaign) and his filing of two lis pendens without a colorable claim to the property provide independent bases for liability which have no constitutional dimension. The propriety of filing a lis pendens is a question of state law. Under Rhode Island law, filing a lis pendens without a colorable claim is not privileged. *Id.* at 1348.

This Court should dismiss this appeal because DeLeo's first amendment petitioning claims are not substantial and because DeLeo's tort liability for slander of title rests on independent and adequate state grounds.

B. THIS COURT SHOULD DISMISS THIS APPEAL BECAUSE DE LEO DID NOT RAISE THE CONSTITUTIONAL ISSUES ASSERTED HERE AT THE EARLIEST OPPORTUNITY.

This Court will not hear issues of constitutional or federal law where they were either not timely raised or expressly passed on below. *Herndon,* 295 U.S. at 443; *Hartford Life Insurance Co. v. Johnson,* 249 U.S. 490, 493 (1919); *Bowe v. Scott,* 233 U.S. 658, 663 (1914). Constitutional issues presented for the first time on a petition to the state's highest court for reargument are not timely raised unless the court's ruling could not have been anticipated. *Herndon,* 295 U.S. at 444. This principle requires this Court to dismiss DeLeo's appeal.[7]

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[7] The Rhode Island Supreme Court did not expressly pass on the constitutional issues raised for the first time in DeLeo's

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Nunes raised the jurisdictional issue created by DeLeo's failure to comply with Rule 3(c) in its pre-briefing statement on April 9, 1987. DeLeo failed to address the alleged constitutional infirmity of Rule 3(c) in his brief, his reply brief or at oral argument. Only after the Rhode Island Supreme Court agreed with Nunes' position did DeLeo decide to raise the constitutional issues in his petition for reargument.

DeLeo claims that this was the earliest possible time to raise the constitutional issues because he could not anticipate that the court would apply Rule 3(c) in the way it did. DeLeo's argument overlooks the fact that he had three opportunities to address the jurisdictional issue raised by Nunes before the decision and ignores the Rhode Island Supreme Court's consistent application of Rule 3(c) to preclude review of issues not properly preserved. *Hood v. Hawkins*, 478 A.2d 181, 1984 (R.I. 1984); *Smith v. Smith*, 119 R.I. 642, 645 n.1, 382 A.2d 182, 183-84 n.1 (1978); *D'Agostino v. Yellow Cab Co. of Providence*, 104 R.I. 168, 169, 243 A.2d 98, 99 (1968). This Court should dismiss DeLeo's appeal because he did not raise his constitutional arguments in a timely manner.

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petition for reargument. This Court has held that it has no jurisdiction to review a state court judgment where the federal issues are not raised until the petition for reargument unless the state's highest court expressly passes on those issues. *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919).

CONCLUSION

For the reasons stated above, this Court should dismiss DeLeo's appeal.

Respectfully submitted,

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